CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **JULY 3, 1996** **NO. 27**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 10

(T.D. 96–51)

REPLACEMENT OF CF 7506 BY CF 7501

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to replace a reference to Customs Form (CF) 7506 in § 10.62(c)(2), Customs Regulations, with a reference to CF 7501. This change was inadvertently omitted from a final rule document published in the Federal Register on October 6, 1995 (60 FR 52294) which replaced all other references to CF 7506 in the Customs Regulations with references to CF 7501.

EFFECTIVE DATE: June 20, 1996.

FOR FURTHER INFORMATION CONTACT: Raymond Janiszewski, Office of Trade Compliance, (202) 927–0380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Previously, CF 7506, Warehouse Withdrawal Conditionally Free of Duty and Permit, was the form used to make warehouse withdrawals for merchandise conditionally free of duty. The CF 7506 has now been eliminated, and the CF 7501 is to be used instead.

In a final rule document published in the Federal Register (60 FR 52294) on October 6, 1995, references to CF 7506 were deleted and replaced by reference to CF 7501. Inadvertently, the reference to CF 7506 in § 10.62(c)(2), Customs Regulations (19 CFR 10.62 (c)(2)), was not deleted in that document and replaced with a reference to CF 7501. This document corrects that omission.

REGULATORY FLEXIBILITY ACT, EXECUTIVE ORDER 12866, INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, AND DELAYED EFFECTIVE DATE REQUIREMENTS

Inasmuch as this amendment merely substitutes one Customs Form for another, pursuant to 5 U.S.C. 553(a)(2) and (b)(B), good cause exists

for dispensing with notice and public procedure thereon as unnecessary. For the same reason, good cause exists for dispensing with the requirement for a delayed effective date, under 5 U.S.C. 553(a)(2) and (d)(3). Also, for the same reason, it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 or 604.

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Caribbean Basin initiative, Customs duties and inspection, Exports, Reporting and recordkeeping requirements.

AMENDMENT TO THE REGULATIONS

For the reasons set forth in the preamble, Part 10 of the Customs Regulations (19 CFR Part 10) is amended as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1321, 1481, 1498, 1508, 1623, 3314;

* * * * * * *

2. Section 10.62(c)(2) is amended by removing the reference "Customs Form 7506" and by adding "Customs Form 7501" in its place.

GEORGE J. WEISE,
Commissioner of Customs.

Approved: May 30, 1996.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, June 20, 1996 (61 FR 31394)]

U.S. Customs Service

General Notices

TREASURY ADVISORY COMMITTEE ON COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

AGENCY: Departmental Offices, Treasury.

ACTION: Renewal of Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service and solicitation of applications for committee membership.

SUMMARY: It is in the public interest to renew the Advisory Committee for another two-year term. This notice also establishes criteria and procedures for the selection of members.

FOR FURTHER INFORMATION CONTACT: Dennis M. O'Connell, Director, Office of Tariff and Trade Affairs, Office of the Under Secretary (Enforcement) (202) 622–0220.

Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. I (1962), and section 95603(c) of the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203), the Under Secretary (Enforcement) announces the renewal of the following advisory committee:

Title: The Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service.

Purpose: The purpose of the Committee is to present advice and recommendations to the Secretary of the Treasury regarding commercial operations of the U.S. Customs Service and to submit a report to Congress containing a summary of its operations and its views and recommendations.

Statement of Public Interest: It is in the public interest to continue the existence of the Committee upon expiration, under the provisions of the Advisory Committee Act, of its current two-year term. The Committee provides a critical forum for distinguished representatives of diverse industry sectors to present their views on major issues involving commercial operations of the Customs Service. These views are offered directly to senior Treasury and Customs officials on a regular basis in a candid atmosphere. There exists no other single body that serves a comparable function.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100–203), Congress repealed the statutory mandate for a Customs User Fee Advi-

sory Committee and directed the Secretary of the Treasury to create a new Advisory Committee on Commercial Operations of the U.S. Customs Service. The original Committee consisted of 20 members drawn from industry sectors affected by Customs commercial operations. The Committee's charter was filed on October 17, 1988 and expired two years later. Charters were subsequently filed for second, third, and fourth two-year terms. The current charter will expire on October 15, 1996. The Treasury Department plans to file a new charter by that date renewing the Committee for a fifth two-year term.

Objective, Scope and Description of the Committee:

The Committee's objectives are to advise the Secretary of the Treasury on issues relating to the commercial operations of the Customs Service. It is expected that, during its third two-year term, the Committee will consider such issues as implementation of the Customs Modernization Act, the North American Free Trade Agreement, administration of staff and resources for commercial operations, broker qualification and licensing, informed compliance and compliance assessment, the account system, automated systems, the impact of the Customs reorganization, and enforcement priorities.

The Committee will be chaired by the Under Secretary of the Treasury for Enforcement. The Committee will function for a two-year period before renewal or abolishment and will meet approximately eight times (quarterly) during the period. An additional special meeting of the full Committee or a subcommittee thereof may be convened if necessary.

The meetings will generally be held in the Treasury Department, Washington, D.C. However, typically one meeting per year, but generally not more than two, may be held outside of Washington at a Customs port. In recent years, meetings have been held in Louisville, Baltimore, New Orleans, Oakland, Chicago, El Paso, Buffalo, and Miami, among other locations. The meetings are open to public observers, including the press, unless special procedures have been followed to close a meeting. During the first four terms of the Committee, only a portion of one meeting was closed.

The members shall be selected by the Secretary of the Treasury from representatives of the trade or transportation community serviced by Customs, the general public, or others who are directly affected by Customs commercial operations. In addition, members shall represent major regions of the country, and not more than ten members may be affiliated with the same political party. No person who is required to register under the Foreign Agents Registration Act as an agent or representative of a foreign principal may serve on an advisory committee. Members shall not be paid compensation nor shall they be considered Federal Government employees for any purpose. No per diem, transportation, or other expenses are reimbursed for the cost of attending Committee meetings at any location.

Members who are serving on the Committee during its expiring two-year term are eligible to reapply for membership. A new application letter and updated resume are required. It is expected that approximately half of the current membership of the Committee will be replaced with new appointees.

Membership on the Committee is personal to the appointee. Under the Committee By-Laws, a member may not send an alternate to represent him at a Committee meeting. However, since Committee meetings are open to the public, another person from a member's organization may attend and observe the proceedings in a nonparticipating capacity. Regular attendance is essential; a member who is absent for two consecutive meetings or two meetings in a calendar year shall lose his seat on the Committee.

Application for Advisory Committee Appointment:

Any interested person wishing to serve on the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service must provide the following:

— Statement of interest and reasons for application;
— Complete professional biography or resume;
— Political affiliation, in order to ensure balanced representation. (Mandatory. If no party registration or allegiance, indicate "independent" or "unaffiliated").

In addition, applicants must state in their applications that they agree to submit to reappointment security and tax checks. There is no prescribed format for the application. Applicants may send a cover letter describing their interest and qualifications and enclosing a resume.

The application period for interested candidates will extend to July 19, 1996. Applications should be submitted in sufficient time to be received by the close of business on the closing date by Dennis M. O'Connell, Director, Office of Tariff and Trade Affairs, Office of the Under Secretary (Enforcement), Room 4004, Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220, ATTN.: COAC 1996.

Dated: June 3, 1996.

JOHN P. SIMPSON,
Deputy Assistant Secretary,
Regulatory, Tariff and Trade Enforcement.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 17, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ORNAMENTAL MUSIC BOX

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of an ornamental music box. Notice of the proposed modification was published on May 8, 1996, in the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 3, 1996.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 8, 1996, Customs published a notice in the CUSTOMS BULLETIN Volume 30, Number 19, proposing to modify Headquarters Ruling Letter (HRL) 950042 dated November 18, 1996. HRL 950042 classified an ornamental music box with a bunny rabbit figurine together with other ornamental articles, under subheading 6913.10.50, Harmonized Tariff Schedule of the United States (HTSUS), which provides, in pertinent part, for statuettes and other ceramic ornamental articles. No comments were received in response to the notice. Pursuant to section

625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 950042 to reflect the proper classification of the merchandise under subheading 9208.10.10, HTSUS as a music box. HRL 958543 modifying HRL 950042 is set forth in the attachment to this document.

Dated: June 17, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 17, 1996.

CLA–2 RR:TC:MM 958543 MMC
Category: Classification
Tariff No. 9208.10.00

MR. JASON LOUIS, PRESIDENT
ACMATE SUPPLY
1977 Quincy Court
Glendale Heights, IL 60139

Re: Modification of HRL 950042; porcelain bunny rabbit figurines mounted on music box: EN 92.08; HRLs 086166, 087132, 953049, 952615, 952595, 952604, 952607, 952609, 082738, 087316, 953536, 952643, 955574, 081657 and 072786; Bureau Letter 491.62; *Pukel v. U.S., Amico v. U.S.*

DEAR MR. LOUIS:

In Headquarters Ruling Letter (HRL) 950042 dated November 18, 1991, resolving a difference in classification, a porcelain figurine of bunny rabbits and an egg mounted on a music box was determined to be classifiable, together with other articles, under subheading 6913.10.50, Harmonized Tariff Schedule of the United States (HTSUS), provides for statuettes and other ornamental ceramic articles of porcelain or china. After review of HRL 950042, we now believe that the porcelain figurine music box is classifiable under subheading 9208.10.00, HTSUS, which provides for music boxes.

Facts:

The article is a porcelain figurine of two bunny rabbits and an egg mounted on a music box. It measures 3½" high.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of HRL 950042 was published on May 8, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 19. No comments were received in response to this notice.

Issue:

Is the porcelain figurine of two bunny rabbits and an egg mounted on a music box classifiable as a porcelain statuette under heading 6913. HTSUS, or as a music box under heading 9208, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRIs). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." For the purposes of this rule, the headings under consideration are as follows:

6913	Statuettes and other ornamental ceramic articles.
9208	Music boxes, fairground organs, mechanical street organs, mechanical singing birds, musical saws and other musical instruments not falling within any other heading of this chapter; decoy calls of all kinds; whistles, call horns and other mouth-blown sound signaling instruments.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 92.08 (pgs. 1561–1562) states, in pertinent part, that music boxes:

> * * * consist of small mechanical movements playing tunes automatically, incorporated into boxes or various other containers. The main component is a cylinder set with pins (according to the notes of the tune to be played); on rotating, the pins contact metal tongues arranged like the teeth of a comb, causing them to vibrate and produce the notes. The components are mounted on a plate and the cylinder is rotated either by a spring-operated (clockwork) motor which is wound with a key or directly by a handle. In some types, the cylinder may he replaced by a sheet-metal disc made on the hill and dale principle * * *
>
> * * * Articles which incorporate a musical mechanism but which are essentially utilitarian or ornamental in function (for example, clocks, miniature wooden furniture, glass vases containing artificial flowers, ceramic figurines) are not regarded as musical boxes within the meaning of this heading. These articles are classified in the same headings as the corresponding articles not incorporating a musical mechanism * * *

EN 92.08 indicates that a music box that is either essentially utilitarian or ornamental in function is excluded from classification as a music movement under heading 9208.

Based on a series of rulings and the language of the ENs, Customs has consistently held that articles with *both* a utilitarian and music box function are excluded from classification under heading 9208, as music boxes. See: Headquarters Ruling Letter (HRL) 086166 dated April 9, 1990, which excluded articles containing a music box/storage compartment from classification as music boxes. See also: HRLs 087132 dated August 12, 1992; 953049 dated February 17, 1993, and 952615, 952595, 932604, 952607, and 952009 all dated December 2, 1992, which excluded dolls containing music boxes from classification as music boxes. Finally see: 082738 dated February 8, 1990; 087316 dated July 7, 1990; 953536 dated July 13, 1993, and 952643 dated January 11, 1993, all excluding various toys from classification as music boxes.

A strict reading of the ENs indicates that a music box which is essentially ornamental in function is excluded from classification as a music box under heading 9208. However, Customs believes that the ENs are not dispositive concerning the classification of music boxes which are essentially ornamental in function. Rather, Customs practice is to classify such music boxes under heading 9208, and item 725, Tariff Schedules of the United States (TSUS) (the precursor tariff provision to heading 9208). This practice is based on two court cases which have ruled on the scope of the music box provision.

Pukel v. United States, 60 Cust. Ct. 672, C.D. 3497 (1968), defined a music box as a small mechanical movement playing tunes automatically, which is incorporated into a box, case or cabinet. The court stated that the musical mechanism by itself is not attractive and has little consumer appeal unless contained in an attractive box. For marketing purposes, the box is most often appropriately designed to conform to the song of the mechanism. *Amico v. United States*, 66 CCPA 5, C.A.D. 1214 (1978), held that dancing figurines enclosed in a plastic base containing a musical mechanism playing waltz tunes were classified as music boxes because the function of the figurines were solely that of design and appearance and as such were subordinate and incidental to the function of the music box. According to the court, the figurines served no function other than being decorative.

Additionally, the principles expressed in these two court cases have been applied in several Customs ruling letters. See: HRL 955574 dated June 3, 1994, classifying a music box

with a ceramic see-sawing Santa; HRL 081657 dated December 1, 1988, classifying a ceramic carousel horse mounted on a wooden music box; HRL 072786 dated September 21, 1983, classifying two figures, a clown and a boy, derived from a Norman Rockwell Saturday Evening Post cover mounted on a music box.

Customs believes that in this instance the ENs, are not dispositive. Rather, we find the HTSUS and TSUS rulings as well as the court cases to be persuasive. The main purpose of a music box is to entertain by playing music. Any ornamental article whose primary appeal is a music box feature and which otherwise meets the music box requirements, remains classifiable under heading 9208. Therefore, the two bunny rabbits and egg figurine mounted on a music box is classifiable under heading 9208, specifically, subheading 9208.10.10, HTSUS, as a music box.

Holding:

HRL 950042 is modified. The bunny rabbits and egg figurine mounted on a music box is classifiable under subheading 9208.10.10, HTSUS, as a music box with a column one duty rate of 3.2% *ad valorem*.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 C.F.R. 177.10(c)(1)].

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING RELATING TO ELIGIBILITY OF FISHING FLIES FOR DUTY ALLOWANCE UNDER SUBHEADING 9802.00.80, HTSUS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter pertaining to the eligibility for the duty allowance under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), of fishing flies.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the eligibility for the duty allowance under subheading 9802.00.80, HTSUS, of fishing flies. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before August 2, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification

Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the eligibility for the duty allowance under subheading 9802.00.80, HTSUS, of fishing flies.

In NY Ruling Letter 816209 dated November 9, 1995, Customs held that fishing flies produced abroad from chicken feathers, thread, hook and other materials were entitled to the partial duty exemption under subheading 9802.00.80, HTSUS. This ruling is set forth in "Attachment A."

The facts in that case involved U.S.-grown chicken capes and saddles (chicken skin) which are sent abroad with U.S.-origin thread. The foreign assembler plucks the feathers from the capes and saddles, and combines them with hooks of Japanese origin and other materials, such as fur, rabbit skins, or deer hair, to complete the fishing fly. In NY Ruling Letter 816209, we found that the feathers and thread were fully fabricated products of the U.S., and that the operations performed abroad which include cutting to length and trimming of the feathers are incidental to the assembly operation. Therefore, we held that an allowance in duty was permitted under subheading 9802.00.80, HTSUS, predicated on the cost or value of the U.S.-origin feathers and thread.

This office has reviewed NY Ruling Letter 816209 in the context of a request for reconsideration by the Port Director, Portland, Oregon, and it is our opinion that the ruling is partially in error.

Subheading 9802.00.80, HTSUS, provides a partial duty exemption for:

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

It is our opinion that the U.S.-origin feathers are not "exported in condition ready for assembly without further fabrication," as required by subheading 9802.00.80, HTSUS, since the operations performed

abroad include plucking the feathers from the chicken capes and saddles, before assembly with the other components. We and that this plucking operation is not a process incidental to assembly, but rather constitutes a significant process whose primary purpose is to complete the production of the feathers. *See* 19 CFR 10.16(c).

Therefore, Customs proposes to modify NY Ruling Letter 816209 to provide that the operations performed abroad include a "further fabrication" of the exported U.S.-origin feathers, and that, as a result, the allowance in duty under subheading 9802.00.80, HTSUS, will not be permitted for the cost or value of the feathers. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter (HRL) 559756 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 13, 1996.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 9, 1995.

CLA–2–95:R:N7:224 816209
Category: Classification
Tariff No. 9802.00.80 and 9507.90.70

CARL D. CAMMARATA
GEORGE R. TUTTLE
3 Embarcadero Center, Suite 1160
San Francisco, CA 94111

Re: The tariff classification of fishing flies from Sri Lanka, Thailand, or India.

DEAR MR. CAMMARATA:

In your letter dated October 26, 1995, you requested a tariff classification ruling on behalf of UFM II, Inc. ("UFM") on the eligibility for a duty exemption under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUSA), for U.S. origin materials sent to foreign assemblers to be combined with other components to create fishing flies.

According to your submission, fishing flies to be used in fresh and salt water sport fishing are assembled into finished form in either Sri Lanka, Thailand, or India from U.S. chicken feathers, thread of U.S. origin, hooks of Japanese origin, and domestic or foreign artificial or natural material such as fur, rabbit skins, or deer hair. It is claimed that the U.S. origin components (the chicken feathers and thread) qualify for an exemption of duty under 9802.00.80, HTSUSA.

The U.S. grown chicken capes and saddles containing the feathers, and the domestically manufactured thread used to attach the feather to the flies will be exported from the U.S.

whereupon foreign assemblers will pluck the feathers from the cape or saddle dried skin, sort them by color and size, and wind the feather around a hook and fly body with a piece of thread to form the completed fly. The feathers remain essentially unchanged from their exported condition except for some minor cleaning and trimming designed to aid the assembly process.

The applicable subheading for sport fishing flies is 9507.90.7000, HTSUSA, which provides for "Fishing rods, fish hooks and other line fishing tackle * * *: Other: Other, including parts and accessories: Artificial baits and flies." The rate of duty is 9 percent *ad valorem*.

Subheading 9802.00.80, HTSUSA, provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubrication, and painting.

All three requirements of subheading 9802.00.80, HTSUSA, must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full cost or value of the imported assembled article, less the cost or value of the U.S. components assembled therein, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14(a), Customs Regulations (19 CFR 10.14(a)), states in part that:

> [t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. An example of an operation with is considered incidental to the assembly process is the cutting to length of wire, thread, tape, foil, and similar products exported in continuous length. *See* section 10.16(b). However, any significant process, operation or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80, HTSUSA, to that component. *See* 19 CFR 10.16(c).

In this case, the imported fishing flies will be eligible for the partial duty exemption available under HTSUSA subheading 9802.00.80. From the facts submitted, the feathers and thread are finished products of the U.S. which are exported for acceptable assembly operations with other components. The cutting to length of the feathers and the trimming operations are considered work incidental to the assembly process and are not further fabrication. *See* section 10.16(b)(4) (trimming, filing, or cutting off small amounts of excess materials is an example of an operation incidental to assembly). The U.S. components do not lose their physical identity in the assembly operation and it appears from a description of the foreign operation that the U.S. components are not otherwise advanced in value or improved in condition except by being assembled and certain operations incidental to the assembly operation.

On the basis of the information presented, the fishing flies will be eligible for the partial duty exemption under subheading 9802.00.80, HTSUSA, when imported into the U.S., upon compliance with the documentary requirements of 19 CFR 10.24. Allowances in duty will be permitted and predicated on the cost or value of the U.S. origin chicken feathers and the thread, F.O.B. the U.S. port of exportation. Under 9802.00.80, HTSUSA, the F.O.B. value should included the purchase price—or if not purchased, the cost to acquire or manufacture the components and the costs of freight and insurance incurred up to the time of the arrival of the components at the port of exportation. In the case of the U.S. manufactured components here, we understand this F.O.B. value to include the cost of domestic production of the feathers and the cost of "UFM" of purchasing the U.S. origin thread from its U.S. vendors. Proposed production averaging figures and the standards used to determine these figures should be presented to the appropriate Customs officers at the port(s) of entry for their review.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding this ruling contact, National Import Specialist Tom McKenna at 212–466–5475.

ROGER J. SILVESTRI,
Director,
National Commodity Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:SM 559756 BLS
Category: Classification
Tariff No. 9802.00.80

PORT DIRECTOR
511 N.W. Broadway
Portland, OR 97209

Re: Reconsideration of NY Ruling Letter 816209; eligibility of a fishing fly for the partial duty exemption under subheading 9802.00.80, HTSUS.

DEAR SIR:

This is in reference to your memorandum dated March 20, 1996, requesting that we review NY Ruling Letter 816209 dated November 9, 1995, which held that certain fishing flies to be imported from abroad are eligible for the partial duty exemption under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

U.S.-origin chicken capes and saddles (chicken skin) and U.S.-origin thread are exported to Sri Lanka, Thailand, or India. At the country of assembly the feathers are plucked from the capes and saddles, sorted by color and size, and clipped or trimmed to aid in the assembly process. The thread and feathers are wound around a Japanese origin hook and body (fur, rabbit skins or deer hair) to form the completed fly. For some types of flies, a small amount of glue may be added to the thread after completion of the fly to make it more durable.

In NY Ruling Letter 816209, Customs found that the feathers and thread were finished products of the U.S., and that the operations performed abroad were acceptable assembly operations or operations incidental to assembly. *See* section 10.16, Customs Regulations (19 CFR 10.16). Therefore, Customs held that an allowance in duty will be permitted under subheading 9802.00.80, HTSUS, based on the cost or value of the U.S.-origin thread and feathers, upon compliance with the documentary requirements of 19 CFR 10.24.

Issue:

Whether, under the facts presented an allowance in duty is permitted under subheading 9802.00.80, HTSUS, for the cost or value of the U.S.-origin feathers.

Law and Analysis:

Subheading 9802.00.80, HTSUS, provides a partial duty exemption for

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under HTSUS subheading

9802.00.80 is subject to duty upon the full value of the imported article, less the cost or value of the U.S. components assembled therein, provided there has been compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14, Customs Regulations (19 CFR 10.14(a)), states in part that:

> The components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during or after their assembly with other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing or the use of fasteners.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. *See* 19 CFR 10.16(b). However, any significant process, operation, or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80, HTSUSA, to that component. *See* 19 CFR 10.16(c).

In the instant case, the feathers are hand-plucked from the chicken capes and saddles in the foreign country before assembly with the other components. The primary purpose of this labor-intensive process completion of the feather component prior to assembly with the hook, thread and other materials. In our opinion, this pre-assembly operation is a significant process which is not incidental to the assembly operation, but constitutes a finishing step in production of the feathers. As a result, a duty allowance may not be granted upon importation of the fishing flies for the cost or value of the U.S.-origin feathers. However, since the thread is a fully fabricated component of the U.S. at the time of exportation, an allowance in duty may be granted for the cost or value of this component, upon compliance with the documentary requirements of 19 CFR 10.24.

Holding:

Chicken feathers used in making fishing flies abroad are not in condition ready for assembly without further fabrication when exported to Sri Lanka, Thailand, or India, since the feathers must be hand-plucked in the foreign country prior to assembly. Therefore, no allowance in duty may be made for the cost or value of the feathers under subheading 9802.00.80, HTSUS. However, an allowance in duty may be made under this tariff provision for the cost or value of the U.S.-origin thread, provided the documentary requirements of 19 CFR 10.24 are satisfied. NY Ruling Letter 816209 is modified accordingly.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF INDUSTRIAL BELTING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementa-

tion Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of industrial belting.

DATE: Comments must be received on or before August 2, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of industrial belting.

Headquarters Ruling Letter (HRL) 084763, issued on September 9, 1989, held, among other things, that certain industrial belting was classifiable under subheading 3917.32.0050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). A copy of the above ruling is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that HRL 084763 was incorrect insofar as it held that certain polyurethane belting which does not have any fabric woven into it was classifiable in subheading 3917.32.0050, HTSUSA (now subheading 3917.32.6000, HTSUSA).

We propose to modify HRL 084763 to place the subject belting in subheading 3926.90.9890, HTSUSA.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying HRL 084763 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.8), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 13, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 9, 1989.

CLA-2 CO:R:C:G 084763 TLS
Category: Classification
Tariff Nos. 5910.00.9000, 3926.90.6000,
3917.39.0050, 3917.32.0050, and 3917.31.0000

MR. GENE HOBSON
BELTING INDUSTRIES CO., INC.
20 Boright Avenue
Kenilworth, NJ 07033

Re: Industrial belts and belting.

DEAR MR. HOBSON:

You request a ruling on the proper classification of industrial belts and belting under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Your letter dated May 12, 1989 has been referred to our office for this purpose.

Facts:

The belts and belting you present are divided into two sections: Breco synchronous belts and Schlatterer flat endless belts and belting. The belting is imported in the form of sleeves, which are very similar to tubes. The belting can be separated into two groups, according to their particular compositions.

Group 1 consists of one or two layers of woven polyester fabrics with a fabric on one surface and a visible plastics layer an the other surface. Where there are two layers of fabric, there is a distinct visible layer of plastics between them. The belting in this group include PU, PU 10, PU 11, PU 20/1, PU-VA 11/12343, PU-VA 11/12343-1, PU VA 1976, PU (flat), PU (flat poly), PU 4/6, PU 10 (flat), PU 11 (flat), PU 12, PU 17, PU 18, PU 20, MINI, NE 10, NE 20, NE 20/133, NE 21, NE 133/1, Si 1, Si 1-S, Si, Si 3, HN 1, HG 1, HK 17, and HK 18.

Group 2 consists of one or two woven polyester fabrics that are completely embedded or entirely coated or covered with plastics. Included in this group are PU + Si, NE 21 (flat), NE 22, NE 22 (flat), NE 25, NE 17, NE 18, and Si 1-B.

There is one sample of belting that does not belong in either group 1 or group 2. PU 0/6 consists of only polyurethane and does not have any fabric woven into it. Although they are imported in a variety of lengths and widths, none of the belting has a thickness of 3 mm or more.

The belts, both Breco and Schlatterer, are either conveyor or transmission, and all are made of some textile material. All are reinforced with a cotton/man-made fiber blend or strictly a man-made fiber. One exception is the Schlatterer PU 0/6 belt, which has no fiber support in it and is made of only polyurethane.

Issue:

How are the various belts and belting properly classified under the HTSUSA.

Law and Analysis:

The General Rules of Interpretation (GRI) govern the classification of articles under the HTS. GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes. Heading 5910 covers transmission or conveyor belts or belting, of textile material, whether or not reinforced with metal or other material. Chapter note 6 (a) of chapter 59 states that heading 5910 does not apply to transmission or conveyor belting, of textile material, of a thickness of less than 3 mm. All of the belts, with the exception of the Schlatterer PU 0/6, fit the description provided for in heading 5910. They are classifiable under this heading. However, none of the belting is classifiable under 5910 because all of the belting have a thickness of less than 3 mm.

Heading 3926 covers other articles of plastics and articles of other materials of headings 3901 to 3914. The Explanatory Notes (EN) of the HTSUSA are the official interpretation of the HTS at the international level. The EN for heading 3926 states that this heading includes transmission, conveyor or elevator belts, endless, or cut to length and joined end to end, or fitted with fasteners. The Schlatterer PU 0/6 belt meets the description of this heading and the EN. It is classifiable under this heading.

Heading 3917 provides for tubes, pipes and hoses and fittings thereof, of plastics. All of the belting are imported in the form of sleeves, which are very similar in construction to tubes. All are made of a plastic of some sort and all except one are reinforced or combined with textile materials. All of the belting are classifiable under heading 3917.

Holding:

All of the belts, with the exception of the Schlatterer PU 0/6 belt, are classified under subheading 5910.00.9000, HTSUSA, as other conveyor and transmission belts of man-made materials.

The Schlatterer PU 0/6 belt is classified under subheading 3926.90.6000, HTSUSA, as another belt for machinery not containing textile fibers.

All of the belting, with the exception of the PU 0/6 belting, is classified under subheading 3917.39.0050, HTSUSA, as tubes other than those which are rigid and not reinforced with other materials.

The PU 0/6 belting is classified under subheading 3917.32.0050, HTSUSA, as a tube not reinforced or otherwise combined with other materials, other than those which are rigid, and other than those of polyvinyl chloride or polyethylene.

Alternatively, any of the belting found to have a minimum burst pressure of 27.6 MPa is classified under subheading 3917.31.0000, HTSUSA, as flexible tubes having such a minimum burst pressure.

This ruling letter pertains only to the classification of the subject articles under the HTSUSA. The Customs Service does not have authority to rule on the applicability of antidumping or countervailing (AD/CVD) duties to these articles. The Department of Commerce has jurisdiction over such matters and therefore is the appropriate forum to address the AD/CVD issue.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:FC 959318 ALS
Category: Classification
Tariff No. 3926.90.9890

MR. GENE HOBSON
BELTING INDUSTRIES CO., INC.
20 Boright Ave.
Kenilworth, NJ 07033

Re: Headquarters Ruling Letter (HRL) 084763, dated September 9, 1989, concerning certain industrial belting.

DEAR MR. HOBSON:

In HRL 084763 you were advised that certain industrial belting of polyurethane, not having any fabric woven in it and referred to as PU 0/6, was classifiable in subheading 3917.32.0060, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We noted that that ruling was based on the premise as to the use of the belting, Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of NYRL 846178 was published March 22, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 12.

Facts:

The article under consideration is industrial belting of polyurethane without any fabric woven into it. The belting comes in a variety of lengths and widths with a thickness of less than 3 mm. The belting is imported in the form of sleeves (tubes).

Issue:

What is the classification of industrial belting made solely of polyurethane and importing in the form of sleeves?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

HRL 084763 held that the subject articles were classifiable under subheading 3917.32.0050, HTSUSA, (now 3917.32.6000, HTSUSA) the provision for other tubes, pipes, hoses, not reinforced, other, of plastics. In considering the propriety of that classification we considered the definition for the expression *"tubes, pipes and hoses"* contained in Legal note 8 to Chapter 39, HTSUSA. That definition provides, in pertinent part:

> For the purposes of heading 3917, the expression *"tubes, pipes and hoses"* means hollow products, whether semimanufactures or finished products, of a kind generally used for conveying, conducting or distributing gases or liquids.

We have noted that the instant product, PU 0/6, while being imported in sleeve or tubular form, is not a tube as that term is defined in the referenced legal note. The product is not a tube of the type generally used for conveying, conducting or distributing gases or liquids. Accordingly, it is not classifiable under the provisions for tubes, pipes and hoses of plastics.

Holding:

Industrial belting (PU 0/6) consisting of only polyurethane and net having any fabric woven into it which is imported in the form of sleeves (tubing), but is not capable of conveying, conducting or distributing gases or liquids, is classifiable in the provision for other articles of plastics, other, in subheading 3926.90.9890, HTSUSA. Merchandise so classifiable is subject to a general rate of duty of 5.3 percent *ad valorem*.

HRL 084763, dated September 9, 1989, is hereby modified as to PU 0/6 belting. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decision pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "LITE STIK GLOWING GHOST DECORATION"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107, Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a "Lite Stik Glowing Ghost Decoration." Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before August 2, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Food and Chemicals Classification Branch, (202–482–6958).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to an article identified as the "Lite Stik Glowing Ghost Decoration" (Item No. 24100). Comments are invited on the correctness of the proposed ruling.

In Headquarters Ruling Letter (HRL) 555610, dated February 1, 1991, a product identified as a "Lite Stik Glowing Ghost Decoration" (Item 24100) was held to be classifiable under subheading 9505.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other." HRL 555610 is set forth as "Attachment A" to this document.

At this time, it is Customs position that the "Lite Stik Glowing Ghost Decoration" does not meet the criteria for festive articles. The fact that the article is identified as a "ghost decoration" does not, in and of itself, convey the requisite association with Halloween. Ghosts and goblins are not particularly Halloween related since they often appear in mythology, movies or cartoons of no significance to Halloween.

It is our determination that the products at issue, is properly classifiable within subheading 3926.40.0000, HTSUSA, which provides for "Other articles of plastics and articles of other materials headings 3901 to 3914: Statuettes and other ornamental articles." This provision is dutiable at the general column one rate of 5.3 percent *ad valorem*. Accordingly, Customs intends to modify HRL 555610 to reflect the proper classification. Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 958482, revoking HRL 555610 is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: June 17, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 1, 1991.

CLA–2 CO:R:C:S 555610 LS
Category: Classification
Tariff No. 3823.90.2900, 9503.90.6000,
9505.90.6000, 7117.90.4000,
9801.00.10, and 9802.00.80

MR. JOHN MORIARTY
IMPORT MANAGER
SPEARHEAD INDUSTRIES, INC.
9971 Valley View Road
Minneapolis, MN 55344

Re: Mini "lite stik" refills containing cyalume chemical, and Halloween items containing a "lite stik"; repackaging; superscope; U.S. fabricated component.

DEAR MR. MORIARTY:

This is in response to your letters dated January 31 and February 1, 1990, to the New York Seaport Customs office, requesting a ruling on the tariff classification of six Halloween items. Your letters, and the samples, were referred to our office for a reply. We regret the delay in responding.

Facts:

Item 24030 consists of two 60 mm. "lite stiks," blister packaged on cardboard and known as "Mini Lite Stik Refills." The lite stik or refill is a plastic tube which contains a vial of cyalume chemical. When the user bends the plastic tube so that it snaps, the chemical glows in the dark. The refill lite stiks are made in Japan from a U.S. manufactured chemical exported from the U.S. in liquid form. The other components are believed to be of Japanese origin. The completed lite stiks are sealed in a foil wrapper in Japan and then sent to Taiwan to be blister packaged before being imported into the U.S. for retail sale.

Item 24020, known as a "Lite Stik Fun Ball," consists of a plastic perforated ball packaged with a 60 mm lite stik. The ball itself is believed to be of Japanese origin. The lite stik is made in Japan from the same components as those comprising item 24030. Both the wrapped lite stik and ball are sent to Taiwan where they are blister packaged together for retail sale. When the consumer is ready to use the item, the lite stik is removed from the foil wrapper, bent so as to activate the glow, and inserted through the perforations in the ball so that it fits inside. Item 24040, known as a "Lite-Stik Whistler," consists of a plastic "whistler" with a handle and string, and a 4 inch lite stik in a foil wrapper, sold together in blister packaging. This lite stik is manufactured and sealed in a foil wrapper in the U.S. It is exported to Hong Kong where it is blister packaged with the whistler, which is produced in China. When the consumer is ready to use the item, the inner vial of the lite stik is bent to allow it to glow, and the glowing lite stik is inserted through the whistler until it snaps into place. After the string inserted to the end of the lite stik, the user then grips the handle and swings the lite stik whistler in a circular motion to create a whistling sound.

Item 24060, known as a "Lite Stik Clip-On Costume Light," consists of a plastic sleeve, which depicts a ghost figure; a plastic pin in the shape of a bat; and a lite stik sealed in a foil wrapper. The lite stik is manufactured and sealed in its wrapper in the U.S. It is then exported to Hong Kong where it is blister packaged with the other articles, which are produced in China. The costume light is used by inserting the glowing lite stik into an opening in the plastic sleeve, and then attaching the pin onto the hole of the lite stik. The item is then pinned to a child's clothing as a Halloween decoration and safety light.

Item 24100, known as a "Lite Stik Glowing Ghost Decoration," consists of a plastic ghost decoration, made in China, and a 4 inch lite stik in a foil wrapper, made in the U.S. These articles are exported to Hong Kong where they are blister packaged together. The consumer uses this item by placing the glowing lite stik on top of a stand inside the ghost decoration.

Item 24050, known as a "Lite Stik Pumpkin Light," consists of a plastic holder, made in China, and a 4 inch lite stik in a foil wrapper, made in the U.S. These articles are exported to Hong Kong where they are blister packaged together. The consumer uses this item by inserting the glowing lite stik onto the holder, and then placing it on the bottom of a carved pumpkin.

You requested a ruling on the tariff classification of these six items. Because all of these items contain U.S. origin articles which are exported abroad and returned, we also considered whether any of them are eligible for the duty exemption under subheading 9801.00.10, Harmonized Tariff Schedule of the United States (HTSUS), upon their return to the U.S. We also addressed whether items 24020 and 24030 are eligible for the partial duty exemption under subheading 9802.00.80, HTSUS.

Issues

I. What is the proper classification of the above-described merchandise? II. Whether any of the items qualify for the duty exemption under subheading 9801.00.10 or 9802.00.80, HTSUS.

Law and Analysis:

Issue I:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

Item 24030:

Heading 3823, HTSUS, provides, in pertinent part, for "chemical products and preparations of the chemical or allied industries * * * not elsewhere specified or included." The Explanatory Notes, which represent the official interpretation of the tariff at the international level, offer guidance in understanding the headings. The Explanatory Note to heading 3823, HTSUS, indicates that the preparations and chemical products of this heading include, inter alia:

> (34) Articles producing a lighting effect by the phenomenon of chemiluminescence, e.g., lightsticks in which the lighting effect is obtained by a chemical reaction between oxalic acid type esters and hydrogen peroxide in the presence of a solvent and a fluorescent compound.

Heading 3823 and its accompanying Explanatory Note describe item 24030. Accordingly, the Mini Lite-Stik refills are classifiable in heading 3823.

Items 24020, 24040, 24060, and 24100:

Before items 24020, 24040, 24060, and 24100 can be used as intended, they must be assembled. Consequently, GRI 2(a) applies.

GRI 2(a) provides for unassembled goods. It mandates that complete or finished articles entered unassembled or disassembled are to be classified in the same heading as the assembled article, provided that, as entered, they have the essential character of the complete or finished article.

As each item contains several components whose end use is readily apparent to the consumer and the assembly of these components involves a simple process, the unassembled articles, as entered, bear the essential character of their finished form. Accordingly, each of these unassembled articles is classifiable under the heading which applies to that article as completed.

Items 24020 and 24040:

Heading 9503, HTSUS, provides, in pertinent part, for "[o]ther toys." In the Explanatory Notes, the general notes for Chapter 95 indicate that this chapter "covers toys of all kinds whether designed for the amusement of children or adults." The phrase "designed for the amusement of" is generally understood to indicate that the use of an article will be a factor when classification as a toy is being considered.

Additional U.S. Rule of Interpretation 1(a), HTSUSA, provides that absent language to the contrary:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

Therefore, in order to be classified as toys, items 24020 and 24040 must be principally used for amusement.

These articles are principally used for amusement; the Lite Stik Whistler is swung around in circles and the Fun Ball is tossed about by children. Accordingly, they are classifiable as other toys in heading 9503, HTSUS.

Item 24060:

While the costume light ghost pin provides minimum amusement, it is not of a comical nature nor does it feature humorous words or sayings—it is simply a novelty pin. Consequently, it is not classifiable in heading 9503 as a toy.

Heading 9505, HTSUS, provides, in pertinent part, for "[f]estive, carnival or other entertainment articles." The Explanatory Note to heading 9505 indicates that the heading covers:

> (A) Festive, carnival or other entertainment articles which in view of their intended use are generally made of non-durable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular holiday are also classified here.
>
> * * * * * * * * *

For the most part, the items described above function primarily as decorative articles. Additionally, heading 9505 is generally regarded as a use provision.

Here, the subject pin serves to adorn, not to decorate. Moreover, while the instant article displays a holiday motif, the pin itself does not belong to a class of merchandise whose principal use is festive. Consequently, the pin is not classifiable in heading 9505.

Heading 7117, HTSUS, provides for "[i]mitation jewelry." Chapter 71, HTSUS, Note 10 indicates that "[f]or the purposes of heading 7117, the expression 'imitation jewelry' means articles of jewelry within the meaning of paragraph (a) of note 8 above * * *." Note 8(a) defines "articles of jewelry" as: "Any small objects of personal adornment (gem set or not) (for example rings * * * brooches * * *) * * *." A brooch is defined in the Jeweler's Dictionary, 3rd edition, 1976, published by Jewelers' Circular Keystone, as: "A piece of jewelry to be worn pinned to clothing, as at the neck or shoulder, on the breast or hat, or in the hair."

The pin features a bar-pin clasp (the type of clasp routinely used on jewelry pins or brooches) and is worn on the breast. As the article adorns the body and presents features associated with brooches, it is classifiable in heading 7117, HTSUS, which provides for imitation jewelry.

Item 24100:

This item is a plastic rendition of a traditional Halloween ghost. Consequently, it qualifies as a festive article in heading 9505, HTSUS.

Item 24050:

No single heading in the HTSUS provides for a combination glow stick and plastic holder as assembled; hence, a classification determination cannot be made by way of GRI 2(a).

GRI 2(b) pertains to mixtures or combinations of a material or substance, and goods consisting of two or more materials or substances. This rule further provides: "The classification of goods consisting of more than one material or substance shall be according to the

principles of rule 3." As item 24050 is made up of two different materials (and, thus, classifiable in two separate headings: heading 3823, HTSUS, for chemical products and preparations of the chemical or allied industries, not elsewhere specified or included; and heading 3926. HTSUS, other articles of plastics), GRI 3 must be consulted.

Here, the two headings at issue refer to part only of the subject Pumpkin Light, and according to GRI 3(a) are to be regarded as equally specific, thereby making resort to GRI 3(b) necessary. According to GRI 3(b), mixtures and composite goods consisting of different materials, or made up of different components, shall be classified as if they consisted of the material or component which gives them their essential character. The Explanatory Notes to GRI 3(b) indicate that "essential character" may be determined by considering "the nature of the material or component, its bulk, quantity, weight, value, or by the role of the constituent material in relation to the use of the goods."

The role that the glow stick plays in relation to the use of the article strongly suggests that the glow stick represents the essential character of item 24050. While the plastic holder holds the glow stick in place, it is the stick which produces the item's desired effect. The glow stick and holder, therefore, are classifiable under heading 3823—the provision which provides for chemical lightsticks.

Issue II:

Subheading 9801.00.10, HTSUS, provides for the duty-free entry of products of the U.S. that are returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, provided there has been compliance with the documentary requirements of section 10.1, Customs Regulations (19 CFR 10.1). Although some change in the condition of the product while it is abroad is permissible, operations which either advance the value or improve the condition of the product render it ineligible for duty free entry upon return to the U.S. See Border Brokerage Co. v. United States, 65 Cust. Ct. 50, C.D. 4052, 314 F. Supp. 788 (1970), appeal dismissed, 58 CCPA 165 (1970).

In Superscope, Inc. v. United States, 13 CIT ____, 727 F. Supp. 629 (1989), the court held that certain glass panels of U.S. origin that were exported, repacked abroad with certain foreign components, and returned to the U.S. as part of unassembled audio cabinets, were entitled to duty-free entry under item 800.00, Tariff Schedules of the United States (TSUS) (now subheading 9801.00.10, HTSUS), since the U.S. panel portion of the imported article was "not 'advanced in value or improved in condition * * * while abroad,' but [was] merely repacked." Id. at 631. Although Superscope concerned the TSUS, not the HTSUS, the decision is believed to be equally applicable to similar situations arising under the HTSUS, since item 800.00, TSUS, and relevant Schedule 8, TSUS, headnotes were carried over virtually unchanged into the HTSUS.

We believe that the decision in Superscope is controlling with respect to items 24040, 24050, 24060, and 24100. All of them contain a lite stik which is manufactured and foil wrapped in the U.S., then exported to Hong Kong for blister packaging with foreign articles, and returned to the U.S. This mere repackaging of the lite stiks with foreign articles neither advances them in value nor improves them in condition. Therefore, with respect to each of these items, a classification allowance in duty may be made under subheading 9801.00.10, HTSUS, for the cost or value of the U.S. manufactured lite stik. This assumes that the documentation requirements of 19 CFR 10.1 are met and that Customs at the port of entry is satisfied that the lite stiks are, in fact, of U.S. origin.

Both items 24020 and 24030 contain lite stiks made from a U.S. manufactured chemical exported to Japan in liquid form and joined there with components believed to be of Japanese origin. The completed lite stiks are sealed in foil wrappers in Japan and exported to Taiwan where they are blister packaged. In both the mini lite stiks and the lite stik fun ball, the chemical is the only U.S. manufactured article. We believe that the operation performed in Japan of incorporating the chemical into the plastic tube to form the completed lite stik significantly advances the value of the chemical. As a result of this operation, the chemical becomes an integral part of a new and different commercial article, the lite stik. Therefore, the U.S. manufactured chemical will not qualify for a duty exemption under subheading 9801.00.10, HTSUS, when items 24020 and 24030, containing the lite stik, are imported into the U.S.

Since the operation in Japan of forming the lite stiks in items 24020 and 24030 may involve an assembly operation we will consider whether the U.S. origin chemical inside the stiks is eligible for the partial duty exemption under subheading 9802.00.80, HTSUS.

Subheading 9802.00.80, HTSUS provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under subheading 9802.00.80, HTSUS, is subject to duty upon the full value of the imported assembled article less the cost or value of the U.S. components, upon compliance with the documentary requirements of Section 10.24, Customs Regulations (19 CFR 10.24).

Since the cyalume substance is a chemical product in liquid form as exported, it does not qualify as a "fabricated component, the product of the U.S." The legislative history of subheading 9802.00.80, HTSUS, makes it clear that the partial duty exemption applies to U.S.-made fabricated components which are of types designed to be fitted together with other components, and does not apply to chemical products, food ingredients, liquids, gases, powders, etc. H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965). Therefore, the cyalume chemical is not eligible for the partial duty exemption under subheading 9802.00.80, HTSUS, when items 24020 and 24030 are imported into the U.S. Therefore, we need not reach the question of whether the information of the lite stiks in Japan constitutes an acceptable assembly operation for purposes of this provision.

Holding:

Items 24050 and 24030 are classifiable in subheading 3823.90.2900, HTSUS, which provides for prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures or natural products) * * * other: mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances: other. The applicable rate of duty is 3.7 cents per kilogram plus 13.6 percent *ad valorem*.

Items 24020 and 24040 are classifiable in subheading 9503.90.6000, HTSUS, which provides for other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; and accessories thereof: other: other: other toys (except models), not having a spring mechanism. The applicable rate of duty is 6.8 percent *ad valorem*.

Item 24100 is classifiable in subheading 9505.90.6000, which provides for festive, carnival or other entertainment articles, including magic tricks and practical joke articles: parts and accessories thereof: other: other. The applicable rate of duty is 3.1 percent *ad valorem*. Item 24060 is classifiable in subheading 7117.90.4000, HTSUS, which provides for imitation jewelry: other: other: valued not over 20 cents per dozen pieces or parts. The applicable rate of duty is 7.2 *ad valorem*.

As indicated in subheading 9902.71.13, HTSUS, toy jewelry provided for in subheading 7117.90.40 valued not over 5 cents per piece and articles provided for in heading 9503 or subheading 9505.90 valued not over 5 cents per unit may enter the U.S. free of duty.

A classification allowance in duty may be made under subheading 9801.00.10, HTSUS, for the cost or value of the U.S. manufactured lite stik in items 24040, 24050, 24060, and 24100. In each of these items, the U.S. origin lite stik: is merely packaged abroad with foreign articles and returned to the U.S.

In items 24020 and 24030, which contain lite stiks made in Japan from a U.S. origin chemical exported from the U.S. in liquid form, the chemical will not qualify for a duty exemption under subheading 9801.00.10, HTSUS, when these two items are imported into the U.S. In addition, this chemical is not eligible for the partial duty exemption under subheading 9802.00.80, HTSUS.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:FC 958482 ASM
Category: Classification
Tariff No. 3926.40.0000

MR. JOHN MORIARTY
IMPORT MANAGER
SPEARHEAD INDUSTRIES, INC.
9971 Valley View Road
Minneapolis, MN 55344

Re: Proposed modification of HRL 555610 concerning the tariff classification of "Lite Stik Glowing Ghost Decoration".

DEAR MR. MORIARTY.

This letter concerns the proposed modification of Headquarters Ruling Letter (HRL) 555610, dated February 1, 1991, in which you were advised of the classification of a "Lite Stik Glowing Ghost Decoration (Item No. 24100) under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Facts:

The subject article is known as a "Lite Stik Glowing Ghost Decoration." It consists of a plastic ghost decoration, made in China, and a 4-inch lite stick in a foil wrapper, made in the U.S. These articles are exported to Hong Kong where they are blister packaged together. The consumer uses this item by placing the glowing lite stick on top of a stand inside the ghost decoration.

In HRL 555610, dated February 1, 1991, this item was held to be classifiable under subheading 9505.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other."

Issue:

Whether the "Lite Stik Glowing Ghost Decoration" is properly classified as a "festive article" under heading 9505, HTSUSA, or under the provision for "Other articles of plastics" heading 3926, HTSUSA.

Law and Analysis:

Classification of merchandise under the HTSUSA, is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN's), which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

Heading 9505, HTSUSA, includes articles which are for "Festive, carnival, or other entertainment purposes." The EN's to 9505, state that the heading covers:

> (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
>
> (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.

* * * * * * *

Although the "Lite Stik Glowing Ghost Decoration" appears to function primarily as a decoration, we have determined that it does not meet the criteria established for classifica-

tion as a "festive" article within subheading 9505.90, HTSUSA. The fact that the article is identified as a "ghost decoration" does not, in and of itself, convey the requisite association with Halloween. Ghosts and goblins are not particularly Halloween related since they often appear in mythology, movies or cartoons of no significance to Halloween.

This product is retail packaged consisting of two items; a plastic ghost and 4 inch lite stick in a foil wrapper which is intended to illuminate the ghost. The lite stick produces illumination by way of a cyalume chemical. The lite stick, if imported separately, would be classifiable under heading 3823, HTSUSA, which provides, in pertinent part, for "chemical products and preparations of the chemical or allied industries * * * not elsewhere specified or included." The EN's to heading 3823, HTSUSA, indicate that the preparations and chemical products of this heading include, *inter alia:*

> (34) Articles producing a lighting effect by the phenomenon of chemiluminescence, e.g., lightsticks in which the lighting effect is obtained by a chemical reaction between oxalic acid type esters and hydrogen peroxide in the presence of a solvent and fluorescent compound.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRI's taken in order. Inasmuch as the product, as packaged, contains two items that may be classified under more than one heading, it is not classifiable pursuant to GRI 1. In this case, we regard the product for classification purposes as a composite good derived from the assembly of the two components, the ghost shell and the lite stick. See GRI 2(a). As a composite good, classification is determined according to GRI 3.

The text of GRI 3 provides, in pertinent part, that composite goods, made up of different components, shall be classified as if they consisted of the component which gives them their essential character. In this case, we regard the ghost component as providing the essential character of the article, following GRI 3(b) and its EN's. Therefore, our position as to which component, the ghost or the lite stick, provides the essential character has not changed from HRL 555610. However, our understanding of the correct scope of heading 9505 has changed, loading us to a different classification of the whole article.

The lite stick is intended to insert into the plastic ghost, thereby providing the plastic figurine with illumination when fully assembled. Thus, it is the plastic ghost which should govern classification of this product because the luminescent lite stick merely enhances the ghost. Further, the plastic ghost would continue to provide ornamentation after the light stick is consumed. Accordingly, the subheading which most specifically describes the assembled article is 3926.40.0000, HTSUSA, which provides for "Other articles of plastics * * * Statuettes and other ornamental articles." The EN's to heading 3926, provide that the heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14, including statuettes and other ornamental articles. Furthermore, we have already indicated that the lite stick would be classifiable in heading 3823, HTSUSA, if imported separately. When imported with the ghost, this product would not be precluded from classification under Chapter 39 pursuant to legal Note 2(b), as a separate chemically defined organic compound classifiable under Chapter 29.

Holding:

The product identified as the "Lite-Stik Glowing Ghost Decoration" (Item No. 24100) is properly classifiable within subheading 3926.40.0000, HTSUSA, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914: statuettes and other ornamental articles." This provision is dutiable under the general column one rate at 5.3 percent *ad valorem*. HRL 555610, dated February 1, 1991, is hereby modified.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
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Senior Judges

James L. Watson

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Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 96–90)

LACLEDE STEEL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYUNDAI PIPE CO., LTD. ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 92–12–00784

[Granting Shinho Steel Co.'s motion for injunction.]

(Dated June 10, 1996)

Schagrin Associates (Roger B. Schagrin, R. Alan Luberda) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Cynthia B. Schultz);* Office of the Chief Counsel for Import Administration, United States Department of Commerce *(Lucius B. Lau),* of counsel, for defendant.

Morrison & Foerster (Donald B. Cameron, Craig A. Lewis, Sue-Lynn Koo) for defendant-intervenors.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This order concerns Shinho Steel Co.'s ("Shinho"), formerly Korea Steel Pipe Co., motion for permanent injunction, pursuant to 19 U.S.C. § 1516a(c)(2) (1994), regarding the liquidation of certain entries subject to antidumping duties.

Judgment was entered affirming the United States Department of Commerce's ("Commerce") final determination after remand, which imposed antidumping duties at a 4.08 percent rate on Shinho's imports of welded non-alloy steel pipe from the Republic of Korea. *Laclede Steel Co. v. United States,* 19 CIT ____, Slip Op. 95–144 (Aug. 11, 1995) *("Laclede").* On September 13, 1995, Laclede Steel Co. appealed this Court's orders granting Union Steel Manufacturing Co. and Dongbu Steel Co. leave to intervene in the action. This appeal is pending. *Laclede Steel Co. v. United States,* No. 96–1029 (Fed. Cir. Oct. 19, 1995).

Meanwhile, Commerce ordered a suspension of liquidation of Shinho's entries made between November 1, 1993 through October 31, 1994 ("second period of review") and between November 1, 1994 through October 31, 1995 ("third period of review") pending the completion of

the second and third administrative reviews. On January 30, 1996, all requests for the second administrative review were withdrawn, and Shinho withdrew its own request for third period administrative review on March 26, 1996. Commerce terminated those reviews. Accordingly, Shinho's entries made during the second and third review periods became vulnerable to an "automatic assessment of duty" pursuant to 19 C.F.R. § 353.22(e) (1995), at the original 6.21 percent antidumping duty deposit rate that was held unlawful by this Court in *Laclede.* Because the Court's judgment was not appealed with respect to Shinho, all parties agree that this judgment is final as it pertains to Shinho. Shinho now moves for an injunction requiring the liquidation of the subject entries in conformity with the Court's judgment.

The sole issue raised by this motion is whether this Court may exercise its authority to enjoin Commerce from imposing antidumping duties on Shinho pursuant to Commerce's original determination, and not in accordance with this Court's judgment, in light of a pending appeal that concerns parties other than Shinho. The Court may act on this motion because the Court retains its jurisdiction with respect to the effect of its judgments. *Holmes Products Corp. v. United States,* 17 CIT 356, 356, 822 F. Supp. 754, 756 (1993).

A. *Timeliness of Motion:*

As a preliminary matter, Commerce challenges the timeliness of Shinho's motion. The Court observes that none of the Court's own rules specifically address the deadline regarding the filing of a motion for post-judgment injunction. USCIT Rule 56.2(a) which governs, *inter alia,* the time for filing a motion for an injunction in an antidumping or countervailing duty action, provides that the motion is to be filed within 30 days from the date of service of the complaint, or at such other time for good cause shown. This rule was intended to reduce costs and procedural delays in antidumping and countervailing litigation by encouraging the early filing of motions for preliminary injunction. While it appears that the rule is designed to address pre-judgment motions for injunction, it does not preclude the filing of post-judgment motions where good cause is shown beyond the 30–day time limit. It does not, however, offer much guidance to parties filing post-judgment motions for injunction.

Congress also failed to impose any specific deadline by which a post-judgment injunction must be filed. Section 1516a(c)(2), which provides for general injunctive relief, does not impose any deadline for injunctions. Instead, it directs the Court to consider motions for injunctive relief in light of a "proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2).

The Court will therefore consider the timeliness of this motion by examining all the relevant circumstances pursuant to 19 U.S.C. § 1516a(c)(2).[1]

First, Shinho correctly points out that it could not have successfully brought any motion for injunction until it and other parties withdrew their requests for administrative review. *See LMI-La Metalli Industriale, S.p.A. v. United States*, 13 CIT 654, 655, 720 F. Supp. 176, 177 (1989) (no irreparable injury can be shown justifying injunction where pending administrative review suspends liquidation of entries and plaintiff will have adequate opportunity to move for injunctive relief at a later date). Although Shinho was one of the parties that made and then withdrew its request for an administrative review, the Court finds that this by itself should not bar its motion. Other circumstances suggest that Shinho's request and withdrawal were made in good faith and did not lead to undue delay. More specifically, Shinho did not have control over the withdrawal of other parties' requests for review. These other pending requests alone would have rendered the filing of the present motion purposeless. *Id.* Additionally, after reevaluating the situation, Shinho became convinced of the futility of pursuing an administrative review and filed the present motion. Shinho should not be penalized for requesting an administrative review and then reevaluating its position in good faith.

Second, there appears to be no formal time limit for post-judgement injunctions at the Court of International Trade. Therefore, no clear deadline exists by which Shinho could take definitive guidance.

Finally, Shinho filed its motion for injunction on the same day that it withdrew its request for administrative review.

Considered together, these circumstances persuade the Court that this motion is timely. The Court and litigants have an interest in motions being brought in a timely manner, and it appears that under the circumstances, Shinho brought the present motion as soon as was practicable.

B. *Availability of Injunction under 19 U.S.C. § 1516a(c)(1):*

Commerce argues that it retains the authority under 19 U.S.C. § 1516a(c)(1) (1994) to order the liquidation of the entries covered in the second and third review periods in accordance with its original determination, and that the Court lacks authority to enter an injunction with respect to those entries. The Court disagrees.

Section 1516a(c)(1) authorizes the liquidation of entries in accordance with Commerce's original determination "[u]nless such liquidation is enjoined by the [Court of International Trade] under [19 U.S.C. § 1516a(c)(2)]." Section 1516a(c)(2) provides for injunctive relief and has been utilized both for pre-judgment injunctions and post-judgment

[1] In *Holmes*, the Court considered the timeliness of a post-judgment motion for injunction as one factor to be weighed in applying the traditional four prong test for injunction. *Holmes*, 17 CIT at 357–8, 822 F. Supp. at 757. While this appears entirely appropriate under the statute, this Court will address the issue of timeliness of motions separately.

injunctions. *See Holmes,* 17 CIT 356, 822 F. Supp. 754; *see also* 19 U.S.C. § 1516a(c)(1) (referring to the Court of Appeals for the Federal Circuit, which suggests that injunction may occur after judgment has been rendered by the Court of International Trade, but before the Federal Circuit has ruled on an appeal). Therefore, section 1516a(c)(1) clearly contemplates that the Court may prevent the liquidation of entries in accordance with Commerce's original determination.

C. *Discussion of Timken:*

Commerce argues that granting an injunction will disturb the statutory scheme as laid out by Congress and is unnecessary in light of Commerce's compliance with *Timken Co. v. United States,* 8 Fed. Cir. (T) 29, 893 F.2d 337 (1990). The Court considers these arguments together and finds that both lack merit. Granting the injunction is consistent with both the statutory scheme and the policy underlying *Timken.*

Entries subject to an antidumping duty order are to be liquidated in conformity with the final court decision in an action. 19 U.S.C. § 1516a(e) (1994); *see also* 19 U.S.C. § 1516a(c)(3) (1994) (stating that if final disposition of an action brought under this section is not in harmony with the final published determination of the Court, the matter is to be remanded to the administering authority for correction).

Entries may, however, be liquidated pursuant to Commerce's original determination if those entries are made prior to an adverse decision by the Court of International Trade and if the liquidation is not enjoined. 19 U.S.C. § 1516a(c)(1) (1994); *see also NTN Bearing Corp. v. United States,* 8 Fed. Cir. (T) 26, 29, 892 F.2d 1004, 1006 (1989).

According to Commerce, the entries from the second and third periods of review are liquidated solely pursuant to 19 U.S.C. § 1516a(c)(1) during the pendency of an appeal. The appeal precludes the operation of 19 U.S.C. § 1516a(e) because "the final court decision in the action" will not have been rendered by the Federal Circuit. In effect, Commerce is arguing that because the decision in *Laclede* is not final for *all* parties, liquidation for those entries belonging to importers who are not party to the appeal, and that were entered prior to the Court of International Trade's judgment, should take place in accordance with Commerce's original determination. The Court rejects this argument under the facts of this case.

First, as noted above, this Court's authority to issue an injunction is expressly contemplated by the statute. 19 U.S.C. § 1516a(c)(1)–(2). Therefore, granting an injunction would not disturb the statutory scheme.

Second, the injunction is more in keeping with the outcome contemplated in *Timken.* According to *Timken,* the authority to liquidate subsequent entries pursuant to Commerce's original determination ceases once notice of the first decision by this Court *or* by the Court of Appeals for the Federal Circuit adverse to Commerce is published. *Timken,* 8 Fed. Cir. (T) at 33–5, 893 F.2d at 340–2; 19 U.S.C. § 1516a(c)(1). If a decision of the Court of International Trade is appealed, *Timken* instructs

Commerce to suspend liquidation as to all future entries until a "conclusive" decision is rendered by the Federal Circuit. Suspension avoids any "yo-yo" effect caused by Commerce changing its liquidation rate between that provided for in Commerce's original determination, the Court of International Trade's judgment, and any subsequent decision of the Federal Circuit. *Timken,* 8 Fed. Cir. (T) at 35, 893 F.2d at 342. According to *Timken,* a "conclusive decision" is one that has conclusively decided the controversy and the decision can no longer be attacked, either collaterally or by appeal. *Timken,* 8 Fed. Cir. (T) at 32, 893 F.2d at 339. The Federal Circuit distinguished a "conclusive decision" from a "final decision" which means a final entered judgment which may be appealable. *Id.*

Commerce claims that it has complied with *Timken* by implementing this Court's judgment as to all future entries by adjusting the cash deposit rates in accordance with *Laclede. See* 60 Fed. Reg. 55,833 (1995).

However, under the circumstances of this case, there is no reason why this Court's judgment should not be given its full effect with respect to entries made *prior* to the Court of International Trade's decision which have been administratively suspended up until the time that requests for administrative review were withdrawn. Although *Timken* only dealt with entries made *subsequent* to the issuance of an judgment by the Court of International Trade, an injunction in this case would render results consistent with the policy underlying the decision in *Timken.*

Timken was concerned with avoiding the "yo-yo" effect that accompanies switching between Commerce's original determination, an amended determination approved by the Court of International Trade after a remand, and a possible subsequent decision by the Federal Circuit. In the present case, both Commerce and Shinho agreed at oral argument that the Court of International Trade's judgment is final with respect to Shinho. There are no appeals pending with respect to Shinho, although there are appeals pending with respect to other parties. The outcome of these appeals will not have any practical effect on Shinho. The time for appeal has run with respect to the judgement's effect on Shinho, thereby making it final and conclusive with respect to Shinho. *See Piazza v. Aponte Roque,* 909 F.2d 35, 39 (1st Cir. 1990) (stating that where some parties have appealed, and the time for appeal has run for the other parties, the inescapable consequence is that the judgment becomes final and conclusive with the respect to the non-appealing parties).

Because this Court's judgement is final and conclusive with respect to Shinho, there can be no "yo-yo" effect if Commerce applies the Court's judgment to all of Shinho's entries not yet liquidated. Indeed, failure to do so will result in a "yo-yo" effect because suspended entries made prior to this Court's judgment, but suspended until the filing of this motion, now will be liquidated alongside subsequent entries under two different rates. The rationale of *Timken* demands that Commerce be enjoined from liquidating at dual rates in this case. Granting the injunction

would mean that Shinho is to receive the benefit of 19 U.S.C. § 1516a(e) for the liquidation of the entries made both prior to and subsequent to this Court's judgment in *Laclede.*

C. *Injunction:*

The Court now will consider whether injunction is appropriate under the facts of this case.

Commerce contends that injunction is inappropriate in the present case because the granting of an injunction is appropriate only where it maintains the status quo or concerns an existing right. *NTN Bearing Corp.,* 8 Fed. Cir. at 28, 892 F.2d at 1006. Commerce argues that the Court would be creating a new right by granting Shinho's motion. The Court disagrees.

All of Shinho's rights were in existence before or by reason of this Court's judgment in *Laclede.* Shinho now is simply asking that this Court's judgment be given its full effect with respect to it. No new rights are created by the Court's enforcement of its judgment.

The Court will therefore proceed to apply the traditional four prong test for a request for injunctive relief. First, the Court finds that Shinho faces immediate and irreparable harm because additional duties totalling hundreds of thousands of dollars may be assessed on entries made during the second and third review periods. In their briefs and at oral argument, Commerce made the argument that it has the authority under 19 U.S.C. § 1516a(c)(1) to order liquidation of the subject entries, during the time of the appeal, in accordance with its original determination even though it has been found to be unlawful by the Court of International Trade. This position puts Shinho at risk that Commerce will impose duties on Shinho which are non-recoverable. Under *Zenith Radio Corp. v. United States,* 1 Fed. Cir. (T) 74, 80, 710 F.2d 806, 810 (1983), liquidation of entries extinguishes the underlying res and the accompanying cause of action, stripping this Court of the ability to provide a remedy to an importer.

Second, there is a compelling public interest in having Commerce promptly comply with the judgments of the Court of International Trade as to all entries not subject to appeal. The argument presented by Commerce that it may continue to impose "unlawful" duties pursuant to 19 U.S.C. § 1516a(c)(1) under the circumstances of this case lacks any basis in public policy. Third, the Court determines that Shinho is most certain to succeed in obtaining duties pursuant to *Laclede,* once the pending appeals are resolved by operation of 19 U.S.C. § 1516a(e). Finally, Commerce has failed to show any hardship to it by having to order the liquidation of these entries in accordance with the Court's decision. Accordingly, an injunction is appropriate in this case.

CONCLUSION

Where a judgment involves multiple parties, the Court of International Trade's judgment pertaining to parties not subject to appeal will be considered "final" and "conclusive" with respect to the entries of those parties not yet liquidated at the time of the judgment, thereby

immediately extending operation of 19 U.S.C. § 1516a(e) to these entries. Commerce should promptly comply with an order of this Court to the extent that it is not the subject of appeal.

For the foregoing reasons, it is hereby:

ORDERED that Shinho's motion to enjoin Commerce from ordering liquidation of the subject entries in accordance with their original determination is granted; and it is further

ORDERED that any liquidation of the subject entries with respect to Shinho shall be in accordance with *Laclede Steel Co. v. United States,* 19 CIT ____, Slip Op. 95–144 (Aug. 11, 1995).

(Slip Op. 96–91)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00169

(Dated June 12, 1996)

ORDER

TSOUCALAS, *Judge:* In accordance with the decision (Mar. 19, 1996) and mandate (Mar. 20, 1996) of the United States Court of Appeals for the Federal Circuit ("CAFC"), Appeal Nos. 95–1300, 95–1341, reversing in part and remanding this case with instructions, it is hereby

ORDERED that the part of the judgment of this Court entered in *Koyo Seiko Co. v. United States,* 19 CIT ____, Slip Op. 95–19 (Feb. 10, 1995) affirming *Koyo Seiko Co. v. United States,* 18 CIT ____, Slip Op. 94–123 (July 29, 1993), which required the Department of Commerce, International Trade Administration ("Commerce") to impose a ten percent cap to each of the five criteria used to match U.S. tapered roller bearings ("TRBs") with home market TRBs, is vacated; and it is further

ORDERED that this case is remanded to Commerce, in accordance with the CAFC's decision and mandate, to recalculate the dumping margins for TRBs manufactured by Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. without imposing the ten percent cap; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

Slip Op. 96–92

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 91–09–00704

(Dated June 12, 1996)

JUDGMENT

TSOUCALAS, *Judge:* On November 22, 1995, this Court remanded this case to the Department of Commerce, International Trade Administration ("Commerce"), concerning *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 41,508 (1991). *Koyo Seiko Co. v. United States,* 19 CIT ____, Slip Op. 95–193 (1995). In accordance with the decision (Sept. 20, 1995) and mandate (Nov. 14, 1995) of the United States Court of Appeals for the Federal Circuit ("CAFC"), Appeal No. 94–1363, the Court ordered Commerce to recalculate the final dumping margin for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") employing the sum-of-the-deviations model-match methodology used to match U.S. tapered roller bearings ("TRBs") with home market TRBs, without a ten percent cap.

On January 22, 1996, Commerce released to the parties a draft computer program which contained the programming changes necessary to remove the ten percent cap from the model-match portion of the computer program. No party commented on the draft results. On February 9, 1996, Commerce filed its redetermination with this Court, *Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States, Slip Op. 95–193 (November 22, 1995), Final Results of Redetermination Pursuant to Court Remand ("Remand Results").*

Commerce has now complied with the Court's instructions and eliminated use of the ten percent cap in its sum-of-the-deviations model-match methodology and recalculated the dumping margins for TRBs manufactured by Koyo. Therefore, Commerce's Remand Results are affirmed and this action is dismissed.

(Slip Op. 96–93)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MFG. CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND RONALD H. BROWN, SECRETARY OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00167

(Dated June 12, 1996)

ORDER

TSOUCALAS, *Judge:* In accordance with the decision (Mar. 19, 1996) and mandate (Mar. 20, 1996) of the United States Court of Appeals for the Federal Circuit ("CAFC"), Appeal No. 95–1356, reversing in part and remanding this case with instructions, it is hereby

ORDERED that the part of the judgment of this Court entered in *NTN Bearing Corp. of Am. v. United States,* 19 CIT ___, Slip Op. 95–52 (Mar. 27, 1995), affirming Commerce's compliance with the Court's order in *NTN Bearing Corp. of Am. v. United States,* 18 CIT ___, 858 F. Supp. 215 (1994), which required the Department of Commerce, International Trade Administration ("Commerce") to impose a ten percent cap to each of the five criteria used to match U.S. tapered roller bearings ("TRBs") with home market TRBs, is vacated; and it is further

ORDERED that this case is remanded to Commerce, in accordance with the CAFC's decision and mandate, to recalculate the dumping margins for TRBs manufactured by NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, and NTN Corporation without imposing the ten percent cap; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 96–94)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00156

(Dated June 12, 1996)

ORDER

TSOUCALAS, *Judge:* In accordance with the March 20, 1996, decision and mandate of the United States Court of Appeals for the Federal Cir-

cuit ("CAFC"), Appeal Nos. 95–1294, 95–1303, reversing in part and remanding this case with instructions, it is hereby

ORDERED that the part of the judgment of this Court entered in *Koyo Seiko Co. v. United States,* 19 CIT ___, 861 F. Supp. 79 (1995), affirming the Court's decision in *Koyo Seiko Co. v. United States,* 18 CIT ___, Slip Op. 94–119 (July 21, 1994), which required the Department of Commerce, International Trade Administration ("Commerce") to impose a ten percent cap to each of the five criteria used to match U.S. tapered roller bearings ("TRBs") with home market TRBs, is vacated; and it is further

ORDERED that this case is remanded to Commerce, in accordance with the CAFC's decision and mandate, to recalculate the dumping margins for TRBs manufactured by Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A. without imposing the ten percent cap; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 96–95)

TOYOTA MOTOR SALES, U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NACCO MATERIALS HANDLING GROUP, INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), AND UNITED SHOP AND SERVICE EMPLOYEES, DEFENDANT-INTERVENORS

Court No. 94–02–00106

Plaintiff moves for judgment upon the agency record to contest certain aspects of Commerce's June 1, 1989, through May 31, 1990, administrative review of an antidumping duty order on certain internal-combustion, industrial forklift trucks from Japan. *See Certain Internal-Combustion Industrial Forklift Trucks From Japan,* 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results). Plaintiff requests a remand with respect to eight issues in the administrative review.

Held: The Court remands to Commerce to correct the following errors: (1) the calculation of West Coast ocean freight expense; (2) the calculation of the marine insurance deduction; (3) the calculation of the deduction for co-op advertising expenses; (4) the calculation of imputed credit expenses for purchase price transactions; (5) Commerce will insert an "FR" before the "48" in line 177 of Commerce's ESP Computer Program. Also on remand, Commerce is to: (1) adjust its calculation of credit revenue and expense to account for those transactions involving wholesale financing, and if necessary, request additional information; (2) recalculate credit expense, credit revenue, and indirect selling expenses and explain its recalculations, and if necessary request additional information; (3) reconsider its calculation of imputed credit expenses, explain the basis for its reconsideration and decision, and request additional information regarding Toyota's actual financing costs if necessary; (4) reconsider the number of days credit expenses were incurred on purchase price sales, if at all, and explain the basis for its decision, and if necessary, Commerce may request additional information and make any and all calculations it deems necessary; (5) explain, and point out evidence on the record supporting, whether

Commerce requested TAL home market indirect selling expense information from Toyota, whether Toyota complied with this information request, and how Commerce ultimately treated TAL's indirect selling expenses. If Commerce is unable to point out evidence in the record supporting whether it requested TAL indirect selling expense information from Toyota, and whether Toyota complied with the information request, Commerce may secure additional information and upon securing that additional information pertaining to TAL's indirect selling expenses, Commerce shall make any and all necessary calculations.

(Date June 14, 1996)

Dorsey & Whitney (John B. Rehm, Munford Page Hall, II, and *L. Daniel Mullaney),* for plaintiff Toyota Motor Sales, U.S.A., Inc.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, United States Department of Justice *(Michael S. Kane), Priya Alagiri,* Attorney-Advisor, United States Department of Commerce, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley, and *David C. Smith, Jr.),* for defendant-intervenors.

OPINION

CARMAN, *Judge:* Plaintiff Toyota Motor Sales, U.S.A., Inc. ("plaintiff" or "TMS") has moved for judgment upon the agency record to contest certain aspects of the United States Department of Commerce's ("Commerce" or "Department") *Certain Internal-Combustion Industrial Forklift Trucks From Japan,* 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results) *(Final Results).* The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

On January 10, 1994, Commerce published the final results of its June 1, 1989, through May 31, 1990, administrative review of an antidumping duty order on certain internal-combustion, industrial forklift trucks from Japan. *See Final Results,* 59 Fed. Reg. at 1374.[1] This review covered, in part, sales made by Toyota Motor Corporation (Toyota). *Id.* at 1375.[2]

Plaintiff requests this Court remand the *Final Results* with respect to eight issues. Plaintiff categorizes three challenged issues as substantive: (1) use of an internal interest rate to calculate imputed credit expense; (2) deduction of certain indirect selling expenses from home market price; and (3) imputation of 27 days of credit expense to purchase price sales. Plaintiff categorizes four challenged issues as ministerial and noncontroversial: (1) calculation of West Coast ocean freight expense; (2) calculation of a marine insurance deduction; (3) calculation of co-op advertising expenses; and (4) calculation of credit expense for purchase price transactions. Plaintiff categorizes the remaining chal-

[1] For further description of the products at issue, see *Final Results,* 59 Fed. Reg. at 1374–75.

[2] Plaintiff TMS is Toyota's U.S. selling division. *See Final Results,* 59 Fed. Reg. at 1378.
The Court notes that in its papers, defendant identifies "Toyota Motor Sales, Inc" as "Toyota." Defendant-Intervenors designate Toyota Motor Sales, U.S.A., Incorporated "Toyota," and also state that "Toyota Motor Sales, Inc." will be referred to as "TMS." Plaintiff uses "plaintiff," "Toyota," and "TMS" as abbreviations for Toyota Motor Sales, U.S.A., Incorporated, and refers to Toyota Motor Corporation as "TMC." The *Federal Register* decision designates Toyota Motor Corporation "Toyota," and designates "Toyota Motor Sales" "TMS." As indicated in this opinion, *supra,* when not quoting a party, the Court's designations will mirror those used in the *Federal Register.*

lenged issue as a controversial ministerial issue. That issue pertains to calculation of credit revenue and,expense. Commerce opposes a remand only on the issue of the deduction of indirect selling expenses from home market price. Defendant-Intervenors NACCO Materials Handling Group, Inc., Independent Lift Truck Builders Union, International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of America (AFL-CIO), and United Shop and Service Employees (collectively "NACCO" or "defendant-intervenors") consent to a remand on plaintiff's ministerial non-controversial issues and on one aspect of the issue of the calculation of credit revenue and expenses, but oppose a remand on the remaining issues.

STANDARD OF REVIEW

The appropriate standard for the Court's review of a final determination by Commerce is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988) (current version at 19 U.S.C. § 1516a(b)(1)(B)(i) (1994)).

DISCUSSION

I. *Clerical Errors in the Final Results:*

All parties agree a remand is warranted so that Commerce may correct several clerical errors in the *Final Results*. These errors are as follows: (1) improper calculation of West Coast ocean freight expense; (2) improper calculation of the marine insurance deduction; (3) improper calculation of the deduction for co-op advertising expenses; and (4) improper calculation of imputed credit expenses for purchase price transactions.

Given the parties' descriptions of these errors in their briefs, the Court agrees these errors appear to be clerical errors appropriate for remand. Accordingly, this Court remands the *Final Results* to Commerce to correct these four clerical errors. *See Federal-Mogul Corp. v. United States*, 872 F. Supp. 1011, 1014 (CIT 1994) ("The Court has stated that 'fair and accurate determinations are fundamental to the proper administration of our dumping laws' and has recognized that 'courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination.'"[3]) (citations omitted).

II. *Calculation of Credit Revenue and Expenses:*

The issue plaintiff has characterized as a controversial ministerial error, miscalculation of credit revenue and expenses, actually consists of two challenges. Plaintiff explains that in the *Final Results*, Commerce decided to exclude from the antidumping calculations credit revenue earned and expense incurred in connection with sales of forklifts to end-

[3] *But see Hyster Co. v. United States*, 858 F. Supp. 202, 206 (CIT 1994) (refusing to permit additional remand for correction of alleged errors where plaintiffs presented new bases of error, were untimely under Commerce's regulations, did not provide the Court with a reason why their request for correction was untimely, and the proceeding was "already lengthy").

users, or what plaintiff refers to as "retail financing." Commerce did, however, decide to include such revenue and expense related to sales to dealers, referred to as "wholesale financing." In so doing, plaintiff maintains, Commerce committed two errors resulting in "substantial excessive deductions to U.S. price,[4] with a consequent substantial increase in the calculation of antidumping duties." (Mem. in Supp. of Pl.'s Mot. for J. Upon the Agency R. (Pl.'s Br.) at 27.)

First, plaintiff claims, through clerical and typographical programming errors, Commerce "did not correctly identify the universe of 'wholesale' financing for which credit revenue and expense was to be allowed." *(Id.* at 27–28.) Plaintiff further breaks down this alleged error in two. First, in line 177 of Commerce's Exporter's Sales Price (ESP) Computer Program, Commerce neglected to add an "FR" before "48."[5] Second, plaintiff argues the ESP Computer Program incorrectly assumed sales with "FR" sales terms were the only sales with wholesale financing. In fact, plaintiff explains, many transactions other than "FR" transactions involved wholesale and not retail financing. Plaintiff claims Commerce, however, inadvertently excluded the credit revenue from those other transactions.[6]

Both Commerce and defendant-intervenors do not oppose plaintiff's assertion that Commerce's failure to insert an "FR" before the "48" in line 177 of Commerce's ESP Computer Program was a ministerial error warranting remand. Accordingly, this Court remands this error to Commerce with instructions to insert an "FR" before the "48" in line 177 of Commerce's ESP Computer Program. *See Federal-Mogul,* 872 F. Supp. at 1014–15 (remanding to Commerce to correct inadvertent computer programming and ministerial errors).

As to plaintiff's claim that Commerce improperly disregarded certain transactions that were in fact wholesale financing transactions, however, a dispute exists. Commerce agrees with plaintiff that a remand is warranted, and explains that

> as a result of programming errors, the final results did not effectuate Commerce's intent of only including in the United States price credit revenue and expenses incurred in connection with wholesale financing. A remand is, therefore, appropriate so that Commerce can correct these programming errors in order that United States price will only be adjusted to reflect credit revenue and expenses incurred with respect to those transactions that Commerce deems to have been "wholesale."

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[4] The Court notes that the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994), amended the antidumping statutes in many respects. Because Commerce's review in this case took place before the amendments took effect, however, this case is governed by the prior statutory scheme.

[5] According to plaintiff, "FR" denotes "fleet rental financing," one of three types of credit arrangements involved. The "48" indicates the number of months defining the period of financing.

[6] One explanation for this error, plaintiff suggests, is that in responding to Commerce's questionnaire, plaintiff had claimed that wholesale and retail financing should be treated identically, and therefore did not distinguish between the two. Although Commerce decided to treat the two types of transactions differently, plaintiff alleges, Commerce "never gave any hint until the Final Results that it would make such a distinction. Therefore, [Commerce] never gave Toyota a chance to specifically distinguish between 'retail' and 'wholesale' financing before it made its decision to include one and exclude the other." (Pl.'s Br. at 31.)

(Def.'s Resp. in Partial Opp'n to Pl.'s Mot. for J. Upon the Agency R. (Def.'s Resp.) at 13.) Defendant-Intervenors, however, dispute Commerce's response that Commerce's exclusion of interest income from certain transactions alleged to be wholesale was a mere programming error. Instead, they argue, plaintiff's incomplete response caused Commerce's action: "Given that the Department had no basis upon which to distinguish between retail and wholesale transactions for transactions other than those sold under the 'FR' plan, the Department was left with no alternative but to exclude interest income for all other sales." (NACCO *et al.*'s Reply to Def.'s Resp. in Partial Opp'n (NACCO's Reply) at 8.)

The Court notes that plaintiff admits it did not segregate retail from wholesale transactions in its responses to Commerce, but explains that, until petitioners argued for the distinction, Toyota had no reason to segregate. Plaintiff also argues Commerce adopted the distinction for the first time in the *Final Results*. Commerce does not shed much light on this situation, other than to explain to the Court that Commerce's intent was not effectuated and to request a remand to correct "these programming errors."

It is not clear whether this situation resulted from "programming errors," as Commerce claims, or from Commerce's failure to request necessary information from Toyota. It appears the latter is more probable. Regardless, defendant-intervenors' claim that "the Department's actions were a direct result of Toyota's failure to distinguish between wholesale and retail transactions in its questionnaire response" does not seem reasonable. If Commerce did not determine until the *Final Results* that it would distinguish between wholesale and retail transactions, Toyota would not have known it had a duty to segregate the two types of transactions in its questionnaire responses in this case unless Commerce had asked Toyota to do so. Defendant-Intervenors do not invite the Court's attention to any question put to Toyota by Commerce that would have required such a response.

In light of the above, this Court will exercise its discretion and remand this issue to Commerce. *See, e.g., Serampore Indus. PVT. Ltd. v. United States,* 12 CIT 825, 834, 696 F. Supp. 665, 673 (1988) (exercising the Court's discretion to remand to Commerce to determine whether an error occurred in a computer input calculation because the action was already being remanded and because "[t]he Court is loathe to affirm a determination that might be based on a questionable record"); *Outokumpu Copper Rolled Prods. AB v. United States,* 17 CIT 848, 854, 829 F. Supp. 1371, 1376 (1993) (finding Commerce's determination not to rely on best information available was proper, in part because the information was not sought, and thus "plaintiffs neither refused nor were they unable to produce information requested in a timely manner and in the form required") (citation omitted). On remand, Commerce is to adjust its calculation of credit revenue and expense to account for

those transactions involving wholesale financing, and if necessary, request additional information.

The second challenge stemming from what plaintiff has characterized as a controversial ministerial error, miscalculation of credit revenue and expenses, is Commerce's alleged failure to adjust Toyota Motor Credit Corporation's (TMCC)[7] credit expense and indirect selling expense corresponding to TMCC's credit revenue. As to TMCC's credit expense, plaintiff explains that although Commerce stated in the *Final Results* it would not account for TMCC's credit expense, Commerce mistakenly "*did* include TMCC's credit expenses as deductions from U.S. price for the 'retail' transactions for which credit revenue was disallowed." (Pl.'s Br. at 32 (discussing *Final Results*, 59 Fed. Reg. at 1379).)[8] To correct this error, plaintiff asks this Court to order Commerce that

> [f]or "retail" transactions, [Commerce] should ignore both the credit revenue and the credit expense reported by Toyota in its response to the questionnaire. [Commerce] should calculate instead a deduction for credit expense that corresponds to the "wholesale" part of the transaction. For transactions with payment terms of FP90, T30, T35, and T90, [Commerce] should impute a credit expense of 90 days, 30 days, 35 days, and 90 days, respectively.

(*Id.* at 34 (citation omitted).) As to TMCC's indirect selling expense, plaintiff argues Commerce mistakenly took TMCC's indirect selling expense into account in its calculation of U.S. price by adding a certain amount of retail credit revenue to indirect selling expense. Plaintiff maintains that a certain amount of the transactional credit revenue should be deducted for "retail" transactions.

On this aspect of plaintiff's challenge, dispute again exists. Commerce asks this Court for a remand, and simply states, without further explanation, that plaintiff "correctly points out that Commerce inadvertently failed to take into account TMCC's credit revenue. On remand, Commerce should be permitted to recalculate credit expenses taking this credit revenue into account." (Def.'s Resp. at 14 (citation omitted).) Defendant-Intervenors, however, oppose a remand. First, defendant-intervenors argue, Commerce improperly responds to plaintiff's argument concerning imputed credit expense: "Toyota was not contending that the Department failed to take into account TMCC's credit revenue. Toyota was claiming that the Department inadvertently included TMCC's credit *expense* in its calculations." (NACCO's Reply at 9.) In any event, defendant-intervenors maintain Commerce's inclusion was neither accidental nor the result of programming errors. Instead, defendant-intervenors characterize the situation as one involving the

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[7] TMCC is a finance company related to TMS. *See Final Results*, 59 Fed. Reg. at 1378.

[8] Plaintiff appears to suggest the errors were effected through Commerce's ESP Computer Program. (*See* Pl.'s Br. at 33 ("[Commerce's] ESP Program eliminated the gross credit revenue from U.S. price, but deducted the full amount of credit expense * * * which was an imputed credit expense incurred by TMCC in financing the retail transaction throughout the period which includes the entire term of the retail contract.").)

use of best information available (BIA) resulting from plaintiff's failure to provide Commerce

> information on the *actual payment dates* to TMS for these transactions. Accordingly, the Department was unable to calculate Toyota's actual credit expense based on the information available to it and so was left with no alternative but to rely on the credit expenses originally reported by Toyota. By relying on Toyota's own information as the best information available to it to calculate this expense, the Department's actions were in accordance with law and supported by substantial evidence and so should be sustained.

(Id.) Second, as to plaintiff's argument Commerce should not have included expenses incurred by TMCC in Toyota's indirect selling expenses because Commerce rejected Toyota's claim for retail credit revenue, defendant-intervenors maintain Commerce does not discuss the argument, and thus does not indicate whether it believes a remand is necessary. Defendant-Intervenors oppose a remand on this aspect of the issue, and allege plaintiff has

> failed to acknowledge that the Department allowed Toyota's claim for credit revenue in wholesale transactions and that TMCC would have incurred expenses related to these wholesale transactions.
>
> So long as the Department allows an offset for credit revenue earned by TMCC, the Department must also include expenses incurred by TMCC related to the sales between TMS and the dealers. Omission of these expenses would unlawfully reduce the cost associated with sales by Toyota to its dealers. The Department's inclusion of these expenses was not a ministerial or programming error and so does not require correction.

(Id. at 10.)

The Court will exercise its discretion to order a remand on this issue as well. This issue somewhat resembles the previous issue. If Toyota did not know that Commerce would disallow its claims regarding the retail transactions until the *Final Results,* Toyota would have no reason to know it should make distinctions between wholesale and retail credit expense in correspondence with Commerce. The same applies to TMCC's indirect selling expenses. On remand, Commerce is to recalculate credit expense, credit revenue, and indirect selling expenses and explain its recalculations, and if necessary request additional information.

III. *Use of an Internal Interest Rate to Calculate Imputed Credit Expense:*

Plaintiff argues Commerce rejected plaintiff's actual financing cost and instead illegally used an internal interest rate to calculate the deduction from U.S. price for credit expenses, resulting in a substantial increase in antidumping duties. *See Final Results,* 59 Fed. Reg. at 1378 ("[I]n calculating credit expenses, the Department used the interest rate paid by TMS to [TMCC], its related finance company."). The internal interest rate paid between related Toyota entities cannot be used,

plaintiff contends, because related party transactions cannot be used as the basis for U.S. price.[9] Moreover, plaintiff maintains, Commerce "never requested, and Toyota never provided, any information on this 'internal' interest rate * * *. [T]he interest rate used by [Commerce], which is substantially higher than the actual interest rate, appears nowhere in the record * * *." (Pl.'s Br. at 12–13.) Accordingly, plaintiff asks this Court to remand this issue to Commerce with instructions "to correct the interest rate used to calculate credit expenses to reflect the actual cost of financing to Toyota from outside sources." *(Id.* at 17.) Commerce "agrees that a remand is appropriate to reconsider this issue," and asks for a remand "so that Commerce can reconsider its calculation of imputed credit expenses and, if necessary, request additional information regarding Toyota's actual financing costs." (Def.'s Resp. at 12.)

Defendant-Intervenors oppose a remand on this issue. First, defendant-intervenors argue that despite Commerce's consent to a remand on this issue, Commerce has failed to identify any error in the *Final Results* and does not otherwise provide justification for a remand. Mere government acquiescence, defendant-intervenors assert, does not warrant a remand, and "the Court must itself evaluate whether the record supports the Department's determination." (NACCO's Reply at 4.) Second, Commerce fully explained its reasons for using TMS' interest rate in the *Final Results*. The transaction under review consisted of the sale of forklift trucks by TMS to the first unrelated party. Based on established practice, Commerce "decided that the interest rate to be used should be based on TMS' experience, not TMCC." (NACCO *et al.*'s Opp'n to the Mot. of TMS for J. Upon the Agency R. (NACCO's Opp'n) at 7.)[10] According to defendant-intervenors, precedent of this Court clearly establishes that Commerce may use transactions between related parties under certain circumstances. *(See id.* at 8 (citing *Hyster Co. v. United States,* 848 F. Supp. 178, 187 (CIT 1994) and *LMI-La*

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[9] Plaintiff explains as follows:

> The starting point for U.S. price is the price to the first unrelated customer in the United States, and no related-party transactions can serve as U.S. price. 19 U.S.C. § 1677(13), 1677a (Supp. 1994).
>
> For this reason, * * * [Commerce] disregarded entirely the transaction between Toyota Motor Corporation ("TMC") in Japan and TMS, its wholly-owned U.S. subsidiary. The prices paid for the merchandise by TMS to TMC have no significance whatsoever for [Commerce's] analysis * * *.
>
> * * * In the cases that involve TMCC, it is TMCC that pays TMS for the imported forklift, and it is TMCC that receives the payment from the sale to the dealer. The price paid by the unrelated dealer to TMCC, the only unrelated-party transaction at issue, serves as the basis for U.S. price. The transaction between TMS and TMCC, which is 100% owned by TMS, is disregarded, as is the transaction between TMC and TMS, which is 100% owned by TMC.
>
> * * * * * * * *
>
> Toyota calculated credit expense, like all other expenses, based on Toyota's actual cost of financing from unrelated sources * * *.
>
> [Commerce], by contrast, has recalculated Toyota's credit expense, so that it is now supposedly based on an internal "expense" paid by TMS to TMCC, which is based on an inter-company rate, of unknown source * * *.
>
> The effect * * * is to deduct from U.S. price a significant portion of the profit that Toyota makes on its sales in the United States. Such a deduction is inappropriate, because one of the goals of the antidumping duty statute is to measure the extent to which Toyota's profit on U.S. sales is too low.

(Pl.'s Br. at 14–17 (citations omitted).)

[10] According to defendant-intervenors, plaintiff informed Commerce that TMS had no short-term loans from unrelated sources, and argued that Commerce should use TMCC's short-term borrowing rate.

> During this review, however, Toyota also reported that TMCC extended credit to TMS. Given that the Department wished to calculate TMS' credit expense, and not TMCC's credit expense, the Department properly relied on the internal corporate interest rate between TMS and TMCC, just as it had done in the prior administrative review.

(NACCO's Opp'n at 7 (citations omitted).)

Metalli Industriale S.p.A. v. United States, 8 Fed. Cir. (T) 157, 912 F.2d 455 (1990)).) Defendant-Intervenors explain: "The concern with using transactions between related parties is that transactions between related parties may understate the actual costs that are incurred and so would not reflect an arm's length transaction. If, however, the related party transaction reflects an arm's length transaction, then, such a transaction may be used." *(Id.* at 9 (citation omitted).) In this case, defendant-intervenors argue, the interest rate properly reflected an arm's length transaction.

In the *Final Results*, Commerce explained its position on this issue as follows:

> For the final results, we calculated U.S. credit expenses based on the experience of the sales division of Toyota. Because TMS is the selling division in the United States, not TMCC, we determined that the interest rate that should be used in the calculation of credit expense is one based on TMS' experience.[11] Because TMS does not have any short-term loans from unrelated sources, we have used the interest rate that TMCC charged TMS to reflect the credit expenses incurred on U.S. sales. This approach is consistent with the credit expense methodology used in the previous administrative review.

Final Results, 59 Fed. Reg. at 1378. Other than this short passage, Commerce does not explain why it used an internal interest rate or why this was permissible. Commerce's brief to this Court fails to illuminate the situation, or to even explain why the agency now agrees a remand is necessary. It is probable that Commerce's limited response is due to the state of the administrative record.[12] Accordingly, this Court will exercise its discretion to remand on this issue.[13] On remand, Commerce is to reconsider its calculation of imputed credit expenses, explain the basis for its reconsideration and decision, and request additional information regarding Toyota's actual financing costs if necessary.

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[11] In the administrative proceeding, Toyota had urged Commerce "to use the interest rate paid by TMCC on its short-term borrowings to calculate credit expenses for sales by TMS because the rate paid by TMCC reflects Toyota's actual cost of financing from unrelated sources." *Final Results*, 59 Fed. Reg. at 1378.

[12] The Court notes that in oral argument on *NACCO Materials Handling Group, Inc. v. United States*, 896 F. Supp. 1248 (CIT 1995), a case involving the same parties and the same administrative review, Commerce informed this Court as follows:

> The reason why the Department of Commerce has consented to a remand with respect to so many issues in this case *and the companion case* is you've carefully gone through the record, you can't figure out what's going on, because institutionally the people who are dealing with this case have left and it's very difficult to figure out what information is there, what the information that's there represents * * *. In order to be fair to both parties, Commerce should have considerable latitude on the remand requesting the information to articulate reasons. In many ways with respect to some of these issues it's almost as if we're starting from scratch because the record is so indecipherable.

NACCO Materials Handling Group, Inc. v. United States, No. 94–02–00096 (CIT Feb. 18, 1994) (transcript of oral argument at 104–05) (emphasis added).

[13] The Court does so notwithstanding defendant-intervenors' argument that the Court must evaluate whether the record supports Commerce's determination. *(See* NACCO's Reply at 4 (referring to *Outokumpu Copper Rolled Prods. AB v. United States*, 17 CIT 848, 829 F. Supp. 1371 (1993) and *Avesta Sheffield v. United States*, 17 CIT 1212, 838 F. Supp. 608 (1993)).) The Court has found Commerce's explanation as set forth in the *Final Results* inadequate. This problem is compounded by Commerce's terse response to this issue in its brief to this Court, and Commerce's comments as to the state of the administrative record. *See Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 855 F. Supp. 1306, 1312 (CIT 1994) (explaining that the agency "and not the Court bears the burden of 'articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'") (citation omitted), *aff'd sub nom. Citgo Petroleum Corp. v. U.S. Foreign-Trade Zones Bd.*, No. 95–1390 (Fed. Cir. May 3, 1996).

IV. *Imputation of 27 Days of Credit Expense to Purchase Price Sales:*

According to plaintiff, "[w]ith no supporting information on the record, [Commerce] incorrectly imputed 27 days of credit expense to purchase price sales, where, in fact, there was none," resulting in an excess deduction from purchase price and an overstatement of the antidumping duty. (Pl.'s Br. at 19.) Plaintiff explains Toyota reported in its questionnaire response that it did not incur credit expense on its purchase price transactions because it received payment immediately upon shipment. Commerce, plaintiff maintains, concurred with Toyota's conclusion through two verifications in the original investigation and first administrative review. Contrary to defendant-intervenors' accusations, plaintiff argues this was not a situation appropriate for use of BIA because Commerce did not request anything Toyota failed to provide. Plaintiff asserts that remarkably, however, Commerce used BIA in the *Final Results* and imputed as credit expense the average time between shipment from Japan and receipt by the customer.[14] Because "absolutely nothing" on the record supports this decision, plaintiff asks this Court to direct Commerce on remand to impute no credit expense to purchase price sales. (Pl.'s Br. at 21.) Commerce joins plaintiff's request for a remand because "there is insufficient evidence presently contained in the record to support a determination that 27 days of credit expenses were incurred with respect to purchase price sales." (Def.'s Resp. at 12.) Accordingly, Commerce asks this Court to allow Commerce to reconsider the issue on remand and, if necessary, to request additional information relevant to the number of days credit expenses were incurred.

Defendant-Intervenors oppose a remand on this issue. First, defendant-intervenors argue the record does not support plaintiff's claim it incurred no credit expense:

> In keeping with other recent cases in which the Department found that credit expenses were incurred when a respondent reported similar payment terms, and in light of evidence on the record in this review that Toyota incurred credit expenses even though Toyota denied these expenses, the Department had no alternative but to rely on the best information available to it to calculate this expense.

(NACCO's Opp'n at 13 (citation omitted).) Second, defendant-intervenors argue plaintiff's claim that the record does not support the *Final Results* on this issue misses the point because plaintiff, and not Commerce or petitioners, bears the burden of justifying claims for adjustment for both indirect and direct selling expenses. Thus, because facts of record indicated plaintiff did incur some credit expenses and because plaintiff failed to provide Commerce with information that would have permitted Commerce to calculate plaintiff's credit expenses for these sales, Commerce had no alternative but to rely on BIA. Finally, defen-

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[14] Plaintiff further explains Commerce "ostensibly justif[ies] this decision" in the *Final Results* by stating payment is immediate with respect to the date of delivery in the United States, but "the questionnaire clearly stated that payment is immediate upon shipment from Japan." (Pl.'s Br. at 21 (citing *Final Results*, 59 Fed. Reg. at 1380).)

dant-intervenors take issue with Commerce's request for a remand: "The government's statement appears to based [sic] on an unfamiliarity with the evidence on the record rather than based on any error committed by the agency." (NACCO's Reply at 5.)

The Court notes that in the *Final Results,* Commerce stated as follows:

> We agree with petitioners that reported credit expenses are incorrect. Although Toyota's [purchase price] sales are made on immediate payment terms (immediate with respect to the date of delivery in the United States), Toyota still incurs some credit expense on these transactions for the time between shipment and payment. An expense must therefore be imputed on [purchase price] sales for the time between shipment from Japan and payment. Because entry dates are unavailable, we used the average number of days between shipment and payment calculated by petitioners in their case brief. Petitioners' figure is based on data provided by Toyota. However, we have no information on the record indicating that Toyota incurred bank charge fees associated with the immediate payment [purchase price] sales and, thus, we cannot make an adjustment for such fees.

Final Results, 59 Fed. Reg. at 1380. Commerce offers the Court no explanation for its change in position other than its statement that the record contains insufficient information to support the *Final Results* on this issue.[15]

It is not clear from the *Final Results* why Commerce found "Toyota still incurs some credit expense on these transactions for the time between shipment and payment." *Final Results,* 59 Fed. Reg. at 1380. In light of the lack of clarity in the *Final Results,* Commerce's own request for a remand, and Commerce's statements to this Court concerning the state of the administrative record, this Court will exercise its discretion and remand this issue to Commerce. On remand, Commerce is to reconsider the number of days credit expenses were incurred on purchase price sales, if at all, and explain the basis for its decision. If necessary, Commerce may request additional information and make any and all calculations it deems necessary.

V. *Deduction of Indirect Selling Expense from Home Market Price:*

Plaintiff's argument on this issue is as follows. Commerce decided to deduct indirect selling expenses incurred by Toyota's manufacturing subsidiary, Toyota Automatic Loom Works, Ltd. (TAL), from U.S. and home market prices. In the preliminary results of this review, Commerce applied coefficients from the previous administrative review to prices from the current review. Although Toyota did not dispute Commerce's decision to use the previous review's coefficients, Toyota did, in its case brief, offer clerical corrections to the coefficient's correct use. Toyota also submitted data on TAL's indirect selling expenses from the

[15] Commerce's response is so sparse that it is impossible to determine whether Commerce believes Toyota incurred no credit expense at all, or whether Commerce merely questions the figure of 27 days. (*See* Def.'s Resp. at 12–13.)

previous review to assist Commerce in correctly implementing its decision to use the coefficients. Commerce, however, rejected the data as new information. Furthermore, although Toyota then offered to submit any information Commerce may need for its final results, Commerce made no request with respect to TAL's indirect selling expenses "because it believed, erroneously, that there was accurate information on the record." (Pl.'s Br. at 18 (citation omitted).) As Toyota stated in its case brief to Commerce, "'If the Department deducts TAL indirect selling expenses from the U.S. price, it must, in fairness, deduct the same category of expenses from the home market price.'" *(Id.* at 19 (quoting Toyota's Case Brief to Commerce (Mar. 13, 1992) at 13 (further citation omitted), *reprinted in* Pl.'s App. Tab 6).) Commerce agreed in the *Final Results,* stating "[w]e have made a corresponding adjustment for TAL's [indirect selling expenses] incurred on [home market] sales." *Final Results,* 59 Fed. Reg. at 1377, *quoted in* Pl.'s Br. at 19. Commerce did not follow through, however, because "it lacked information on the record." (Pl.'s Br. at 19.)

Commerce, characterizing this issue as one of untimeliness, disputes plaintiff's claim and opposes a remand on this issue. According to Commerce, the deadline for submission of all factual information was January 28, 1992, the date of publication of the preliminary results. Commerce argues that although it requested Toyota report its home market indirect selling expenses, Toyota did not do so until after the deadline. "Under these circumstances," Commerce charges, "the whole point of Toyota's untimely information was to persuade Commerce to use factual information that Toyota should have provided in response to Commerce's questionnaire." (Def.'s Resp. at 10.) Because Toyota does not fall into any of *"the exceptionally rare case[s]"* permitting acceptance of late data, Commerce claims it properly rejected Toyota's submission, and "concluded that TAL incurred no such expenses and simply determined an appropriate offset * * * that did not include TAL home market indirect selling expenses." *(Id.* (citation omitted).)

Defendant-Intervenors side with Commerce, and characterize Commerce's actions as proper use of BIA. According to defendant-intervenors, in a supplemental questionnaire Commerce requested Toyota provide information on the allocated portion of TAL's indirect selling expenses. They contend Toyota refused to provide the information, instead stating:

> Adjustments a-d called for by this question are the subject of our responses to Questions 1, 3, 5 (with respect to indirect selling expenses only), and 7 in our letter to the Department, dated June 6, 1991. That letter explained how Toyota would make the adjustments in the first administrative review, if the Department finally decided that Toyota should do so. Toyota will therefore await the Department's decision before it proceeds to make the adjustments in the second administrative review.

(Public Record (P.R.) 74 at 13, *reprinted in* NACCO's App. 1, *quoted in* NACCO's Opp'n at 10.) Defendant-Intervenors argue Toyota's state-

ment reveals "Toyota purposefully chose not to submit the information requested by the Department in this review, even though it had submitted the information in the first review." (NACCO's Opp'n at 10 (footnote omitted).) As to Toyota's submissions subsequent to the January 28, 1992, deadline, defendant-intervenors insist Commerce's regulations "specifically permit the Department to reject factual information submitted after the preliminary results are published." *(Id.* at 12.)

Plaintiff disputes these accounts by Commerce and defendant-intervenors of what transpired, and argues this is not an instance of untimely submission of data. Plaintiff argues that because TAL is a manufacturing and not a selling subsidiary, Toyota did not report indirect selling expenses from TAL in its initial questionnaire responses. Following verification in the first administrative review but prior to issuance of the second review's preliminary results, plaintiff explains, Commerce requested that Toyota

> describe how such expenses should be allocated, if the Department decided that they should be submitted and allocated. If the Department had requested TAL data, as it intended, Toyota would have submitted TAL's home market and U.S. indirect selling expenses, both for the first time, simultaneously. In fact, without any such request, and without any warning or notification, the Department simply deducted TAL's U.S. indirect selling expenses—taken from the first administrative review—in the *Preliminary Results* for the second administrative review at issue here, ignoring TAL's home market indirect selling expenses.

(TMS' Reply to Resp. Brs. of Def. and Def.-Intervenors at 21–22 (footnote omitted).) In response, plaintiff contends, it submitted in its case brief TAL home market indirect selling expense deduction from the first administrative review that corresponded to the U.S. indirect selling expenses for TAL deducted by Commerce. "This was the first chance that Toyota had to submit these data, and they were submitted solely in response to the Department's deduction of the U.S. portion of TAL's indirect selling expenses." *(Id.* at 22.) Plaintiff admits that in the preliminary results Commerce's "request was described in terms of U.S. indirect selling expenses incurred by TAL," but argues "the same information was needed for home market sales, since no expenses for either market had been reported." *(Id.* at 21 n.7 (citation omitted).) Because Commerce "never requested any TAL data, but only asked how it would be allocated if requested, Toyota never submitted any TAL data for the second administrative review at issue, either for the U.S. market or for the home market." *(Id.)*

To resolve this controversy, the Court must determine whether Commerce requested the appropriate information from Toyota. *See Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) 69, 79, 899 F.2d 1565, 1574 (1990) (explaining the BIA statute "clearly requires noncompliance with an information request before resort to the best information rule is justified, whether due to refusal or mere inability")

(emphasis and citation omitted).[16] It appears Commerce did request Toyota:

Report here all expenses incurred during the period not reported elsewhere.

(1) Itemize each type of expense incurred.
(2) For each type of expense listed in (1), identify whether the expense is a selling, general/administrative, or other type of expense.
(3) For each type of expense listed in (1), state whether the expense is directly related to the sale of the merchandise.
(4) Demonstrate how you allocate these expenses to the merchandise under review. Submit all worksheets or calculations and identify the source of your data * * *.

(P.R. 8 at B–11, *reprinted in* Def.'s App. 1.) Commerce also asked Toyota to "[a]llocate the portion of TAL indirect selling expenses incurred on behalf of *sales to the United States*." (P.R. 66 at 2 (emphasis added), *reprinted in* Pl.'s App. Tab 11).

It is unclear, however, what Commerce was attempting to say, and what Commerce did, in the *Final Results* with respect to TAL's indirect selling expenses. *See Final Results*, 59 Fed. Reg. at 1376–77. As reported in the *Final Results*, Toyota contended "the Department should not rely on best information available * * * to calculate * * * certain indirect selling expenses (ISE) incurred in Japan on behalf of U.S. sales * * *." *Id.* at 1376. In response, Commerce stated, "We agree with Toyota * * *. For the final results, we did not request additional information for * * * TAL ISE * * * because we calculated these expenses using information previously submitted by Toyota." *Id.* at 1377. In response to Toyota's arguments "that in calculating the TAL ISE incurred with respect to U.S. sales in Japan, the Department should have applied the ISE ratio to the TAL selling price, not to the much higher selling price of [TMS] in the United States," and that

> as is evident from the information submitted and verified in the first review, TAL incurred the identical category of indirect selling expenses for [home market] sales as for U.S. sales * * *. [I]f the Department deducts TAL indirect selling expenses from U.S. price, it must also in fairness deduct the same category of expenses from [home market] price[,]

Commerce responded as follows:

> We agree with Toyota that in the preliminary results we incorrectly calculated ISE incurred in Japan by TAL with respect to U.S. sales. For the final results, we have applied the indirect selling expense factor to the reported transfer price between TAL and TMS instead of to TMS' reported selling price in the United States. We have

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[16] In *Olympic Adhesives*, the reviewing court made its statement in reference to 19 U.S.C. § 1677e(b) (1982). *See Olympic Adhesives*, 8 Fed. Cir. (T) at 69, 899 F.2d at 1567. In 1988, § 1677e(b) was redesignated as § 1677e(c), the codification relevant to the determination at issue. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1331(1), 102 Stat. 1107, 1207 (1988).

> made a corresponding adjustment for TAL's ISE incurred on [home market] sales.

Id. The Court cannot discern from these statements what information Commerce received from Toyota, whether Commerce agreed in whole or in part with Toyota, what information, if any, Commerce deemed as late and unacceptable, and what Commerce used as BIA. Accordingly, this Court will again exercise its discretion and remand this issue to Commerce. *See Conoco, Inc.*, 855 F. Supp. at 1312 (explaining that the agency "and not the Court bears the burden of 'articulat[ing] a satisfactory explanation for its action including a rational connection between the facts found and the choice made'") (citation omitted); *Timken Co. v. United States*, 852 F. Supp. 1122, 1126 (CIT 1994) (remanding to Commerce because it was not clear to the Court "whether Commerce [had] received all the data it requested * * * and, if it did not, whether Commerce [had] deemed the missing data unnecessary"). On remand, Commerce is to explain, and point out evidence on the record supporting, whether it requested TAL home market indirect selling expense information from Toyota, whether Toyota complied with this information request, and how Commerce ultimately treated TAL's indirect selling expenses. If Commerce is unable to point out evidence in the record supporting whether it requested TAL indirect selling expense information from Toyota, and whether Toyota complied with the information request, Commerce may secure additional information and upon securing that additional information pertaining to TAL's indirect selling expenses, Commerce shall make any and all necessary calculations.

CONCLUSION

After considering the arguments of all parties, and after due deliberation, the Court holds that the final results of Commerce's administrative review in *Certain Internal-Combustion Industrial Forklift Trucks From Japan*, 59 Fed. Reg. 1374 (Dep't Comm. 1994) (final results) is remanded to Commerce. On remand, Commerce is to correct the following errors: (1) the calculation of West Coast ocean freight expense; (2) the calculation of the marine insurance deduction; (3) the calculation of the deduction for co-op advertising expenses; (4) the calculation of imputed credit expenses for purchase price transactions; (5) Commerce will insert an "FR" before the "48" in line 177 of Commerce's ESP Computer Program. Also on remand, Commerce is to: (1) adjust its calculation of credit revenue and expense to account for those transactions involving wholesale financing, and if necessary, request additional information; (2) recalculate credit expense, credit revenue, and indirect selling expenses and explain its recalculations, and if necessary request additional information; (3) reconsider its calculation of imputed credit expenses, explain the basis for its reconsideration and decision, and request additional information regarding Toyota's actual financing costs if necessary; (4) reconsider the number of days credit expenses were incurred on purchase price sales, if at all, and explain the basis for its decision, and if necessary, Commerce may request additional

information and make any and all calculations it deems necessary; (5) explain, and point out evidence on the record supporting, whether Commerce requested TAL home market indirect selling expense information from Toyota, whether Toyota complied with this information request, and how Commerce ultimately treated TAL's indirect selling expenses. If Commerce is unable to point out evidence in the record supporting whether it requested TAL indirect selling expense information from Toyota, and whether Toyota complied with the information request, Commerce may secure additional information and upon securing that additional information pertaining to TAL's indirect selling expenses, Commerce shall make any and all necessary calculations.

(Slip Op. 96–96)

WESTERN STATES IMPORT CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–09–00652

[On classification of hybrid bicycles, summary judgment for the defendant.]

(Decided June 14, 1996)

Jenner & Block (Brock R. Landry, John B. Morris, Jr. and *Mark D. Harris)* for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(James A. Curley);* Office of the Assistant Chief Counsel, U.S. Customs Service *(Chi S. Choy),* of counsel, for the defendant.

Collier, Shannon, Rill & Scott (Michael R. Kershow and *John B. Brew)* for the Bicycle Manufacturers Association of America, Inc., *amicus curiae.*

OPINION

AQUILINO, *Judge:* In this action, which has been designated a test case pursuant to CIT Rule 84(b), the plaintiff contests classification of its merchandise by the U.S. Customs Service under subheading 8712.00.35 of the Harmonized Tariff Schedule of the United States ("HTS") ("Bicycles having both wheels exceeding 63.5 cm in diameter: Other"), contending that its cycles with such wheels are correctly classifiable under immediately preceding subheading 8712.00.25 ("If weighing less than 16.3 kg complete without accessories and not designed for use with tires having a cross-sectional diameter exceeding 4.13 cm"). The prescribed rate of duty under that subheading is 5.5% *ad valorem* as opposed to the eleven percent actually assessed by Customs.

I

Unsuccessful protest of the Service's classification and resultant duty assessment has led the plaintiff to now interpose a motion for summary

judgment pursuant to CIT Rule 56. The defendant counters with a cross-motion for similar summary relief.

The court's jurisdiction is predicated upon 28 U.S.C. § 1581(a). Its Rule 56(i) requires "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." Such statement by the plaintiff ("WSI") is, in part, as follows:

> 6. WSI designs, imports into the United States, and sells through retail distributors * * * three models of bicycles under the "Diamond Back" brand name, called the "Approach," "Cross Campus," and "Cross Country" * * * [the "WSI Models"]. Each of these bicycles is described as a "cross" or "hybrid" model because it combines the features of a road bike and a mountain bike * * *.
>
> 7. The * * * WSI Models at issue have the following features:
>
> A. Both wheels of the bicycle exceed 63.5 cm in diameter;
>
> B. The bicycle weighs less than 16.3 kg complete without accessories;
>
> C. The bicycle is equipped with tires having a cross-sectional diameter of 1.5 inches.
>
> * * * * * * *
>
> 8. Each WSI Model is imported * * * partially assembled in individual cartons. The carton contains a set of 700c x 38c tires, having a cross-sectional diameter of 1.5 inches, as well as all other parts of the bicycle * * *.
>
> 9. WSI selected and specified K–164 700c x 38c gumwall tires as having the optimal size, cross-sectional diameter, rolling resistance, and tread pattern for the three cross models * * *. WSI approved these same tires in the "Sales Specification" * * * issued by the manufacturer of the bikes, China Bicycles Co., Ltd * * *. WSI created and distributed to its authorized dealers a Sales Guide * * *, which references these tires for the cross models * * *. WSI also created a consumer catalog, provided to prospective consumers, containing detailed descriptions of each model * * *. The tires specified for each of the cross models at issue is *[sic]* Cross Center Ridge 700c x 38c * * *.
>
> 10. WSI did not intend or plan that the Models be used with any tires other than those specified in the Sales Specification, the WSI Sales Guide, and the Diamond Back catalog * * *.
>
> 11. WSI designed and offered for sale in 1993 a number of other bicycle models that had tires exceeding 4.13 cm in cross-sectional diameter * * *.
>
> 12. Prior to 1989, * * * Customs * * * classified bicycles under the "not designed for use with tires" language based upon the size of the tire with which the bike was entered. If no tire was provided with the imported bicycle, Customs assumed that the tire would be of a size normally used on such models * * *.
>
> 13. In April of 1989, the * * * Service determined that certain cross bikes similar to the WSI Models were properly classified under the equivalent of subheading 8712.00.25, and thus a rate of duty of 5.5% was properly imposed on such bikes * * *.

> 14. On August 27, 1990, * * * Customs * * * reversed its April 1989 determination, and declared that the cross bikes at issue in that case were properly classified under the TSUS equivalent of subheading 8712.00.35 (requiring a duty rate of 11%), even though the bikes at issue had been imported with tires that did not exceed 1.625 inches in cross-sectional diameter. Customs decided that a bicycle should be classified under 8712.00.25 only if "important design features * * * preclude the use of tires exceeding 1.625 in diameter." * * *

In its response submitted in accordance with CIT Rule 56(i), the defendant admits each of the foregoing representations except under 7, as to which it admits that the WSI models have the features indicated in the lettered subparagraphs "but denies that those are the only features possessed by the models", and number 10, which it denies

> because the plaintiff designed the frame members and forks of the bicycles in issue wide enough to accommodate tires that are wider than those with which the bicycles were imported. Moreover, it is customarily known in the trade which imports and sells cross bikes that retailers in the ordinary course of business, and users of cross bikes, sometimes substitute wider tires for the original tires.

Defendant's statement in support of its own motion for summary judgment alleges that the following are material facts, among others, as to which there is no genuine issue to be tried:

> 3. The design of the rims, fork, chainstay and seastay of a bicycle determine*[sic]* the maximum cross-sectional diameter of a tire that can be safely used on that bicycle. The chainstay of the imported bicycles in issue is the narrowest point of the bicycle through which the tire must pass.
>
> 4. The dimensions of the rims, forks, chainstays and seastays of the three cross models in issue can accommodate tires having widths greater than 4.45 cm. (1.75 in.).
>
> 5. The Diamond Back Sales Guide expressly states that each of the cross models "may be identified by 700 c rims with medium or wide tires * * *. "* * * The plaintiff imports a cross bike, the Over Ride model, that is equipped with a tire of 4.13 cm (1.625 in.) or greater in width.
>
> 6. There are a variety of tires available for 700c rim bicycles, including the three cross models. The widths of these tires vary between 3.8 and 4.5 cm., and the tires also may have different treads.

The plaintiff admits paragraphs 4 and 6 and the first sentences of paragraphs 3 and 5, as well as the fact that it imports a cross bike named Over Ride.[1]

II

The court has reviewed all of the evidence submitted by each side and finds it supportive of the respective averments. While, as just shown, the

[1] *See* Plaintiff's Response to Defendant's Statement of Material Facts Not in Dispute, pp. 1, 2.

parties are not in complete agreement on all of them, the court is unable to conclude that this action cannot be resolved by summary judgment because trial is necessary to resolve the few factual disagreements. None is "such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States,* 17 CIT 79, 83, 813 F.Supp. 848, 852 (1993), quoting *Pfaff American Sales Corp. v. United States,* 16 CIT 1073, 1075 (1992). Rather, the court concludes that the dispositive issue is a question of law. *See, e.g., W.R. Filbin & Co. v. United States,* 945 F.2d 390, 392 (Fed.Cir. 1991). It is summarized by counsel for the plaintiff as

> whether, as Defendant asserts, "not designed for use with" means "incapable of being used with." Plaintiff contends, in contrast, that "not designed for use with" should be interpreted using the common meaning of the words, and that a bicycle is "not designed for use with" tires exceeding 1.625[inches] in diameter if the manufacturer of the bicycle (1) intended that 1.5[–inch] tires be used, and (2) designed, built, and equipped the bike consistent with that intent.[2]

A

As paragraphs 12–14 of plaintiff's statement show, prior to 1990 Customs had classified bicycles in the manner the plaintiff prefers, but that the Service thereafter "reversed" itself, deciding that a bicycle should be classified under HTS 8712.00.25 only if "important design features * * * preclude the use of tires exceeding 1.625 inches in diameter." Plaintiff's Exhibit 2, Customs HQ 087735, p. 3 (Aug. 27, 1990). That letter ruling points out that the courts have not had occasion to construe the not-designed-for phrase at issue. *Id.* at 2.

(1)

Indeed, the brief for the *amicus curiae* states (at pages 9–10) that the phrase "is a unique tariff proviso, and does not appear anywhere else in the tariff schedule." Be that as it may, the opposite of the phrase, namely, "designed for" or "specially designed for" has appeared in tariffs and been interpreted by courts. For example, in *Sports Industries, Inc. v. United States,* 65 Cust.Ct. 470, 473, C.D. 4125 (1970), the court held that whether an article is "specially designed" or "specially constructed" for a particular purpose may be determined by an examination of the article itself, its capabilities, as well as its actual use or uses, citing *United States v. Air-Sea Forwarders,* 54 CCPA 67, C.A.D. 907 (1967), *Marshall Field & Co. v. United States,* 20 CCPA 225, T.D. 46037 (1932), and *Lionel Trading Co. v. United States,* 15 Ct.Cust.Appls. 365, T.D. 42562 (1928). In *Marubeni America Corp. v. United States,* 35 F.3d 530, 535 (Fed.Cir. 1994), a case focusing on whether a motor vehicle was principally

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[2] Plaintiff's Reply Brief in Support of Summary Judgment, pp. 1–2. The footnote (1) to this summary recognizes the statutory change to the metric system of measurement:

> * * * Thus, the original 1.625" measurement of tire cross-sectional diameter is now 4.13 cm. The tires on the bicycles in question are 1.5" (or 3.81cm) in cross-sectional diameter. Customs has implemented a 1.75" (or 4.45cm) measurement of frame clearance.

Id. at 1.

designed for the transport of persons or of goods, the court opined that, to answer the question, "one must look at both the structural and auxiliary design features, as neither by itself is determinative." That is, even if an object has a primary or principal design, it is not automatically controlling. *See, e.g., Sears Roebuck & Co. v. United States,* 22 F.3d 1082 (Fed.Cir. 1994). *Cf. F.W. Myers & Co. v. United States,* 425 F.2d 781 (CCPA 1970) (that cylindrical steel tank was designed for storage of compressed gases did not preclude classification as railroad car); *Trans-Atlantic Company v. United States,* 471 F.2d 1397 (CCPA 1973)(attached spring should not govern classification of hinge); *Karoware, Inc. v. United States,* 564 F.2d 77, 82 (CCPA 1977) ("'designed' is ambiguous, being susceptible of interpretation as 'intended' or as 'particularly and especially constructed'"); *United States v. Abbey Rents,* 585 F.2d 501 (CCPA 1978)(motorized wheelchair as article of furniture not established to the exclusion of its primary, mobility function).

In this action, the language at issue which was adopted by Congress for HTS 8712.00.25 is in the negative *viz. "not* designed for use with * * *". On its face, it is restrictive and thereby essentially leaves a party in plaintiff's position to disprove realistic usage other than that claimed.[3]

(2)

To accord with defendant's current approach, the plaintiff has to demonstrate that features of its bicycles' design(s) vitiate use of tires having a cross-sectional diameter exceeding 4.13 centimeters. Defendant's exhibit A herein is a copy of Customs letter ruling HQ 952558 (Oct. 25, 1993) on the question of whether a "Univega hybrid bicycle" imported with 3.5 cm-wide tires was entitled to classification under subheading 8712.00.25. The Service responded in the affirmative on the grounds that that cycle

> was designed with a permanently welded bridge across the chainstay * * * that * * * prevents a tire greater than 4.13 cm in width from being used without the immobilization of that tire by contact with the bridge * * *.
> * * * [A] clearance of greater than 1.6 mm would not exist between the tire and a frame member, the permanently welded bridge. Therefore, we conclude that the bicycle was not designed for use with tires having a cross-sectional diameter exceeding 4.13 cm, and it is classifiable under subheading 8712.00.25, HTSUS.

The bicycles now before this court do not possess such permanent structural impediment to "safe and proper use of tires having a cross-sectional diameter exceeding 4.13 cm", to quote from HQ 952558, page 1.

(3)

The plaintiff does not gainsay the absence of such an impediment, but it does deny that evaluating frame and fork sizes is the correct approach

[3] *Cf.* Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 24 ("The question is not mere physical feasibility").

and that either the legislative or administrative history of the tariff provision is supportive of Customs herein. Moreover, the "evidence is uncontested that WSI planned the bicycles to be used with 1.5 inch tires, and equipped them with the same."[4]

Whatever the merit of this argument, the fact remains that Congress has opted to classify bicycles of the kind at bar on the basis of two characteristics which are dependent on tire dimensions, which, of course, can and do vary. Moreover, bicycle tires are changeable, as are the wheels upon which they are mounted. Nor are they necessarily a constant vis-à-vis the structural components to which they attach. Nonetheless, the plaintiff refers to

> the axiom of Customs law that imported merchandise is dutiable in its condition as imported, so long as no deception is practiced * * *. Thus, the WSI Models must be classified on the basis of the tires supplied with them, because they form the condition of the bike as imported * * *. The bicycle's design is reflected in the way it is equipped when it first enters the country.[5]

It also contends that additional U.S. Note 2 to HTS chapter 87 supports its interpretation. That note provided at the time of importation:

> For the purposes of classifying bicycles under the provisions therefor [ ] in heading 8712, the diameter of each wheel is the diameter measured to the outer circumference of the tire which is mounted thereon or, if none is mounted thereon, of the usual tire for such wheel.

It is clear from the statement(s) of facts at hand that the plaintiff specified K–164 700c x 38c gumwall tires and that the same were shipped with each of the models in question, but it is not apparent that those tires were actually mounted on the wheels entered or that they were the "usual" tires for such composite wheels.[6] In any event, it has been conceded that those wheels and tires resulted in diameters exceeding the 63.5 centimeters required for classification under subheading 8712.00.25 *et seq.*, but it is not conceded (or shown) that tire sidewall dimensions control cross-sectional diameters. In fact, plaintiff's own sales literature states that cross bikes "may be identified by 700c rims

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[4] *Id.*

[5] *Id.* at 10–11 (citations omitted). *But compare* Declaration of Customs Nat'l Import Specialist Robert DeSoucey, para. 9:

> While some * * * [hybrid] bicycles have been imported with narrow tires, it has been my experience that the tires are, in many cases, replaced by dealers with tires having a greater cross-sectional diameter than those with which they were imported, and the bicycles then sold with the wider width tires.

and Defendant's Exhibit B (Costantino, *Diamond Back Arrival*, June 1987 Bicycle Guide 62, 62–63):

> * * * Sure, the Arrival has narrow racing tires, but Diamond Back doesn't put them on to scare you away; it puts them on to save you money. You see, imported bikes with narrow tires slip past the border with a smaller duty—5.5 percent for bikes with tires 1.625 inches or smaller versus 11 percent on bikes with tires wider than that. And the duty applies not just to the tires, but to the whole bike. So the Arrival comes with narrow tires to beat the tariff, but it's not particular about what shoes it wears once it hits the States. In fact, there's plenty of room around the fork and chainstays to swallow the fattest tire on the market * * *.

with Declaration of James Bellas (Appendix A to Plaintiff's Reply Brief in Support of Summary Judgment), para. 6:

> Consumers very rarely request that tires equipped on hybrids by the manufacturer be changed. I believe that this situation occurs in no more than 1 or 2 percent of all sales of hybrid bicycles by bicycle dealers. If a consumer wanted wider tires on a hybrid bicycle, he could find such models without any need to change the tires on a bicycle.

[6] For the specified makeup of the wheels, see pages 2 of exhibits B, C and D to the affidavit of Bradley E. Hughes, plaintiff's exhibit 12.

with medium or wide tires". Affidavit of Bradley E. Hughes, Exhibit E, p. 29. And unlike wheel diameter, Congress has not seen fit to adopt a headnote covering tire cross-sections.

On its part, Customs posed the following question in its rulings HQ 950319 (Dec. 11, 1991), HQ 951864 (Oct. 23, 1992) and HQ 952558 (Oct. 25, 1993):

> Does a clearance of greater than 1.6 mm exist between the bicycle tire and fork or any frame member when the wheel assembly is rotated to any position? For example, is the width of the front fork (measured horizontally where the widest part of a tire would be located) greater than 4.45 cm (this represents 4.13 cm plus 1.6 mm on each side of the tire)? If the answer is "no", then the bicycle is classifiable within subheading 8712.00.25, HTSUS.

The plaintiff criticizes the clearance thus adopted as "faulty on its face"[7] in that it is based on a regulation of the Consumer Product Safety Commission ("CPSC"), 16 C.F.R. §1512.11(b), which governs minimum, as opposed to maximum, bicycle-wheel clearance[8] and also that *Marubeni America Corp. v. United States*, 35 F.3d at 537, holds that non-tariff regulations of other government agencies are not dispositive for purposes of tariff classification. But the subheading Customs is charged to enforce requires negative consideration of bicycle frame and fork design for use with tires of particular cross-sectional diameters, including those exceeding 4.13 centimeters.

III

Given that the design of the frames and forks of plaintiff's merchandise can use tires exceeding that statutory limit for classification under HTS subheading 8712.00.25 and that such usage is neither unheard of nor out of the ordinary, this court is unable to conclude that its classification under subheading 8712.00.35 was incorrect. *Cf. Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984). That is, plaintiff's reliance on its stated intent has not overcome the statutory presumption of correctness, 28 U.S.C. § 2639(a)(1), in this action or satisfied the burden of persuasion on its motion for summary judgment.

If this must be the conclusion on its motion, the plaintiff argues against grant of defendant's cross-motion for summary judgment on the ground that "Customs has misconstrued the CPSC standards and its test leads to serious safety problems." Plaintiff's Reply Brief in Support of Summary Judgment, p. 22. If such is the case, as the plaintiff itself argues, those problems are not the responsibility of the Service—or of this Court of International Trade, which can and therefore will enter judgment now on the classification issue properly within its jurisdiction.

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[7] Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 22.

[8] The regulation provides:

Alignment. The wheel assembly shall be aligned such that no less than 1.6 mm (1/16 in.) clearance exists between the tire and fork or any frame member when the wheel is rotated to any position.

(Slip Op. 96–97)

NATIONAL STEEL CORP., AK STEEL CORP., BETHLEHEM STEEL CORP., GULF STATES STEEL, INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LTV STEEL CO., SHARON STEEL CORP., U.S. STEEL GROUP A UNIT OF USX CORP., AND WCI STEEL, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND HOOGOVENS GROEP B.V. AND N.V.W. (U.S.A.), INC., DEFENDANT-INTERVENORS

Consolidated Court No. 93–09–00616–AD

[Commerce's final antidumping determination upheld.]

(Decided June 14, 1996)

Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer and *John J. Mangan)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis), Edward Reisman,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, and *Niall P. Meagher)* for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* National Steel Corporation, AK Steel Corporation, Bethlehem Steel Corporation, Gulf States Steel, Inc. of Alabama, Inland Steel Industries, Inc., LTV Steel Company, Inc., Sharon Steel Corporation, U.S. Steel Group A Unit of USX Corporation, and WCI Steel, Inc. ("Domestic Producers") contest the final results of the second remand determination filed by Commerce pursuant to this court's order in *National Steel Corp. v. United States,* 913 F. Supp. 593 (Ct. Int'l Trade 1996) [hereinafter *National Steel II]. Redetermination on Reremand; Final Determination of Sales at Less than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products and Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands* (A–421–803/804) (Feb. 12, 1996) [hereinafter *Second Remand Redetermination].* The court has jurisdiction over this action pursuant to 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

BACKGROUND

In *National Steel Corp. v. United States,* 870 F. Supp. 1130 (Ct. Int'l Trade 1994) [hereinafter *National Steel I],* the court reviewed challenges to Commerce's investigation of cold-rolled carbon steel flat products from the Netherlands. *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products and Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands,* 58 Fed. Reg. 37,199, *amended by Antidumping Duty Order,* 58 Fed. Reg. 44,172 (Dep't Comm. 1993) [hereinafter *Final Determination].* In particular, the court reviewed Commerce's selection and application of the highest non-aberrant margin as the best information available (BIA). Although

the court upheld Commerce's use of BIA and its selection of the highest non-aberrant margin as BIA, the court found the particular margin that Commerce had chosen appeared aberrant. The court directed Commerce to provide standards for judging the highest non-aberrant margin and to select a BIA margin that would be indicative of Hoogovens' sales.

Further, the court considered Commerce's adjustment to the United States price (USP), which sought to account for the Dutch value added tax (VAT). Commerce sought to eliminate the false dumping margin created when adjusting the VAT by applying the tax *rate* to the USP. To do this, Commerce added to the USP the actual *amount* of the tax imposed on the foreign market value (FMV) in the home market, but forgiven upon exportation. The court, following *Federal-Mogul Corp. v. United States,* 834 F. Supp. 1391 (Ct. Int'l Trade 1993), found this tax-neutral methodology contrary to law, and remanded the tax adjustment to Commerce for recalculation.

On remand, Commerce developed two principles for its selection of the highest non-aberrant margin. First, Commerce sought a margin sufficiently adverse so as to be consistent with the statutory purposes of the BIA rule—to induce respondents to provide Commerce with complete and accurate information in a timely fashion. Second, Commerce sought a margin indicative of Hoogovens' sales. Although Commerce properly reasoned that the BIA rate should be based on transactions involving substantial commercial quantities, Commerce selected its margin because it found approximately three percent of the transactions by volume had calculated margins higher than the BIA rate. *Redetermination on Remand; Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products and Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands* (A–421–803/804) at 5 (Feb. 17, 1995) [hereinafter *First Remand Redetermination].*

Pursuant to the court's remand, Commerce also changed its methodology to comport with *Federal-Mogul* when adjusting for VAT. *First Remand Redetermination* at 2. Commerce added to the "USP the result of multiplying the foreign market tax rate by the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales." *Id.* at 2.

Upon review, the court found Commerce's two guidelines for selecting the highest non-aberrant margin reasonable, as Commerce's selected margin now had to have a rational relationship to the foreign manufacturer's sales, and therefore could provide a link to defendant-intervenors', Hoogovens Groep B.V. and N.V.W. (U.S.A.), Inc. ("Hoogovens"), customary selling practices. However, although the court found that Commerce had demonstrated its selected margin as being sufficiently adverse, *First Remand Redetermination* at 5, Commerce had failed to explain how that margin was rationally related to Hoogovens' sales and indicative of Hoogovens' customary selling practices. The court found the mere existence of a significant number of transactions with higher

margins than Commerce's selected BIA margin did not necessarily support Commerce's conclusion that its selected margin was indicative of Hoogovens' customary selling practices. Further, while Commerce found that the BIA rate was "a transaction involving a substantial commercial quantity[,]" *id.* at 5, the court determined that Commerce failed to demonstrate why it found Hoogovens' sales to be substantial, and how Commerce defined "substantial" with regard to Hoogovens' sales.

The court also reviewed Commerce's methodology to account for the VAT the exporting country would have assessed had the merchandise in question been sold in the home market. As the Court of Appeals for the Federal Circuit upheld Commerce's original methodology, *Federal-Mogul Corp. v. United States,* 63 F.3d 1572, 1580 (Fed. Cir. 1995), this court permitted Commerce to return to it. *National II,* 913 F. Supp. at 598. Pursuant to this methodology, Commerce added the *amount* of the foreign tax, rather than applying the foreign tax *rate,* in calculating the adjustment needed to account for the VAT. *Id.*

The court remanded Commerce's redetermination and: (1) directed Commerce to provide a reasoned explanation to demonstrate how Commerce's selected BIA margin was indicative of Hoogovens' customary selling practices and rationally related to Hoogovens sales; and (2) permitted Commerce the option to reapply its original tax-neutral methodology. *Id.* The results of Commerce's second remand redetermination are now before the court.

DISCUSSION

This court shall uphold Commerce's final determination in an antidumping duty investigation unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

I. *Selection of the Highest Non-aberrant Margin:*

Pursuant to the court's instructions, Commerce reexamined its selection of the BIA margin and found that its selected margin was indicative of Hoogovens' customary selling practices and rationally related to Hoogovens' sales. *Second Remand Redetermination* at 7–8. Commerce found the sale which corresponded to its selected margin involved a product which (1) was common in Hoogovens' Purchase Price and Exporter Sales Price transactions, (2) possessed among the highest sales volumes in terms of tonnage, and (3) for ESP sales, was the product with the largest volume. *Id.* at 8–9.

Further, Commerce also found the particular sale chosen was of a substantial commercial quantity and fell well into the mainstream of Hoogovens' transactions based on quantity. *Id.* Finally, Commerce found nothing in the record to indicate that this particular sale was not trans-

acted in a normal manner. *Id.* The parties have not challenged Commerce's remand redetermination with respect to this issue.

As Commerce's selected margin is both sufficiently adverse to meet the requirements of the BIA rule and indicative of Hoogovens' sales, and as substantial evidence on the record supports Commerce's selection, the court upholds Commerce's determination with respect to its selection of the highest non-aberrant margin.

II. *Recalculation of VAT & the Duty Deposit Rate:*

Commerce changed its treatment of VAT, as permitted by *Federal-Mogul,* 63 F.3d at 1580. *Second Remand Determination* at 5. Commerce returned to its methodology as described in footnote 4 of *Zenith Electronics Corp. v. United States,* 988 F.2d 1573, 1582 n.4 (Fed. Cir. 1993). *Id.* Following this methodology, Commerce sought to add the amount of the foreign tax, rather than apply the foreign tax rate, in calculating the adjustment needed to account for the VAT. *Id.* at 3. As a consequence of this change, Commerce also recalculated the cash deposit rate.

Subsection 1673b(d)(2) provides that Commerce:

> shall order the posting of a cash deposit * * * equal to the estimated average amount by which the foreign market value exceeds the United States price * * *.

19 U.S.C. § 1673b(d)(2) (1988); *see also* 19 U.S.C. § 1673e(b) (1988) (applying similar calculation for final determination). In determining the absolute dumping margin pursuant to 19 C.F.R. § 353.2(f)(1), Commerce compared the FMV with the USP. *Second Remand Determination* at 10. Commerce then calculated the weighted average dumping margin, which serves as the cash deposit rate, by dividing "the aggregate dumping margins by the aggregated United States prices" pursuant to 19 C.F.R. § 353.2(f)(2) (1993). *Id.* at 10–11. Commerce's regulations interpret the term "United States price," as used in subsection (f), as the price *after* Commerce has made all adjustments as provided for by law. *See* 19 C.F.R. § 353.41(d)(iii) (1993) (defining USP as post-adjustment Exporter Sales Price and Purchase Price).

Domestic Producers contest Commerce's recalculation of the VAT adjustment pursuant to the tax-neutral methodology described in footnote 4 of *Zenith Electronics.* Domestic producers claim this methodology only provides partial tax neutrality because it understates the amount of cash deposits on future entries of the subject merchandise. In making this argument, Domestic Producers compare two calculations of the cash deposit rate distinguished by whether they include VAT.

Domestic Producers contend that if a 20 percent VAT is applied to the FMV, Commerce's methodology would ensure a tax-neutral result for the absolute dumping margin (the amount the FMV exceeds the USP), but an understated margin for the cash deposit rate applied to future imports. The reason for this discrepancy, according to Domestic Producers, is that although the difference between the new FMV and the new USP remains the same (because, pursuant to *Federal Mogul,* Commerce adds the same amount of the tax to both the FMV and the USP), the

denominator, the new USP which would now include the added VAT, would be larger and, therefore, would reduce the overall cash deposit rate for future imports. As a result, Domestic Producers argue, Customs will consistently undercollect estimated duties.[1] *(Domestic Steel Producers Comments on the Second Remand Redetermination of the Department of Commerce* at 3.)

Domestic Producers contend such underpayment would violate the statutory directive underlying duty calculation to produce reasonably correct duty deposit rates, as mandated by the Court of Appeals for the Federal Circuit in *Torrington Co. v. United States*, 44 F.3d 1572, 1578–79 (Fed. Cir. 1995). Domestic Producers claim that *Torrington* found (in the context of an administrative review, rather than an initial duty determination as here) that title 19 does not require the same method of calculation for cash deposit rates as for duty assessments, so long as the methodology does not result in the consistent underpayment of estimated duties. *Torrington*, 44 F.3d at 1579. Domestic Producers assert that because Commerce's present methodology results in the systematic and consistent undercalculation of duty deposit rates, Commerce is obligated to adjust the rates to reflect existing dumping margins accurately.

The court disagrees. Commerce's methodology does not underrepresent duty deposit rates. The statute mandates that the cash deposit rate used for future imports must be equal to the absolute dumping margin, however, it does not establish precisely how that margin should be calculated. The two calculations both result in cash deposit rates which equal the absolute dumping margin. Although the results of the calculations differ because of the addition of VAT, this discrepancy follows from the use of different data; the relationship between the cash deposit rates and the absolute dumping margins, nonetheless, remains the same.

Commerce bases the cash deposit rate upon the "estimated average amount by which the foreign market value exceeds the United States price." 19 U.S.C. § 1673b(d)(2). The estimated average amount is dependent upon how "foreign market value" and "United States price" are calculated. For example, when the VAT is added to the FMV and the USP, the difference between the FMV and the USP remains the same (this difference constitutes the absolute dumping margin applied to Hoogovens), but the margin is smaller proportionally in relation to a larger USP.[2] This calculation does not defeat the statute's mandate. Section 1673b only requires the cash deposit rate to equal the absolute mar-

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[1] For example, when a company is dumping goods in the United States for $100, and selling goods in the foreign market for $120, the absolute dumping margin for duty assessment is $20 ($120 – $100 = $20). The *ad valorem* cash deposit rate for future imports would be 20 percent ($20/$100 = 20%).

If a 20 percent VAT is applied to the home market sale (20% of the FMV of $120 = $24) and to the USP, using the same figures, the difference between the new FMV of $144 ($120 + $24 = $144) and the new USP of $124 ($100 + $24 = $124), would give the same absolute dumping margin of $20 for purposes of Hoogovens' duty assessment ($144 – $124 = $20). However, the addition of the VAT reduces the *ad valorem* cash deposit rate. When the absolute dumping margin of $20 is divided by the new USP of $124, the *ad valorem* rate becomes 16 percent ($20/$124 = 16%). Although Domestic Producer's reasoning is seductive, it is premised on the notion that the two calculations are comparable and must result in the same outcome. They are not, for the reasons discussed *infra*.

[2] Using the previous example, the $20 absolute difference would make up a smaller proportion of the USP, as the USP would include the added $24 VAT amount ($20/$124 rather than $20/$100).

gin's proportion of the USP, not that the cash deposit rate equal the proportion of a USP figure *which does not include VAT. Id.* Commerce has met this goal.

The statute has not defined what constitutes the USP or the absolute dumping margin used for the assessment. The court does not find that "Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Rather, Congress has left to the agency "the choice of a course to follow in pursuit of a Congressional purpose, embodied in a statute, and the agency has issued regulations or taken other considered and official action, declaring that course." *Federal Mogul*, 63 F.3d at 1579. This court must defer to Commerce's interpretation of the statute, provided that Commerce makes a permissible construction of the statute. *Id.* The court finds Commerce's interpretation reasonable and has been supported by the Federal Circuit.

In *Torrington*, the Federal Circuit found, in the annual review context[3], that "[t]itle 19 requires only cash deposit estimates, not absolute accuracy [and that such] estimates need only be reasonably correct pending the submission of complete information." *Torrington*, 44 F.3d at 1579. The Federal Circuit found that there is no guarantee that one particular methodology would necessarily result in "a more accurate estimation of future duties than reliance on total United States price." *Id.* Rather, the court reasoned that "United States price" would be "subject to both upward and downward adjustment, depending on many factors" and could change between administrative reviews. *Id.* Thus, Commerce "cannot predict whether use of the entered value for any given review period would produce a more accurate cash deposit rate." *Id.*

Similarly here, the calculations in Commerce's estimate may change between the initial determination and a subsequent administrative review. Such calculations merely serve as an approximation until an administrative review is requested. As such, the inherent imprecision of estimating future cash deposit rates would grant Commerce substantial discretion. Further, *Federal Mogul* presents Commerce "with a choice between methodologies for calculating dumping margins that are tax-neutral, on the one hand, and methodologies that are not tax-neutral, on the other." *Federal Mogul*, 63 F.3d at 1581. In light of the considerable discretion that subsection 1673b(d)(2), *Torrington*, and *Federal Mogul* have given Commerce, and in the absence of a conflict between the statutory mandates and Commerce's regulations, the court sustains Commerce's methodology for calculating the cash deposit rate.

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[3] Calculation of cash deposit rates and assessment rates during an administrative review involves a similar statute, 19 U.S.C. § 1675(a)(2) (1988), to the one involved in this case. Subsection 1675(a)(2) provides:

> [T]he administering authority shall determine—
>
> (A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of each entry exceeds the United States price of the entry.
>
> Th[is] determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

CONCLUSION

The court finds Commerce's selected highest non-aberrant margin as BIA for Hoogovens' unreported ESP data sufficiently adverse to meet the requirements of the BIA rule, indicative of Hoogovens' sales and customary selling practices, and supported by substantial evidence on the record.

Further, in light of Commerce's considerable discretion, and, in the absence of a conflict between the statutory mandates and Commerce's regulations, the court sustains Commerce's methodology for calculating the cash deposit rate. Accordingly, Commerce's second remand redetermination is sustained.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/56 6/7/96 DiCarlo, J.	Alps Electric (USA), Inc.	93–10–00681	8537.10.0020 5.3%	8471.92.2000 Duty free	Alps Electric (USA) Inc. *v.* U.S. Nov. 7, 1995 Court No. 93–04–00228	Los Angeles and San Francisco Computer keyboards not containing integrated circuits
C96/57 6/7/96 DiCarlo, J.	Alps Electric (USA), Inc.	94–03–00179	8537.10.0020 5.3%	8471.92.2000 Duty free	Alps Electric (USA) Inc. *v.* U.S. Nov. 7, 1995 Court No. 93–04–00228	Los Angeles and San Francisco Computer keyboards not containing integrated circuits
C96/58 6/7/96 DiCarlo, J.	Alps Electric (USA), Inc.	94–09–00562	8537.10.0020 8537.10.9020 5.3%	8471.92.2000 Duty free	Alps Electric (USA) Inc. *v.* U.S. Nov. 7, 1995 Court No. 93–04–00228	Los Angeles and San Francisco Computer keyboards not containing integrated circuits
C96/59 6/7/96 Musgrave, J.	Bemis Manufacturing Company	95–09–01148	8480.71.9010 3.9%	9801.00.20 Duty free	Agreed statement of facts	Chicago Previously imported two-piece mold for a plastic lawn chair seat and back
C96/60 6/13/96 Musgrave, J.	Howmet Turbine Components Corp.	94–12–00805	7326.90.90 5.7%	8479.90.95 3.7%	Agreed statement of facts	Dallas Wax pattern dies consisting of aluminum molds

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